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THE ROLE OF THE FEDERAL MAGISTRATE JUDGE IN CIVIL JUSTICE REFORM

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In the Civil Justice Reform Act of 1990 ("CJRA"),¹ Congress called for a major reexamination of the way in which civil litigation is conducted in the federal district courts. Each of the ninety-four federal district courts was required to appoint an advisory group, and these groups are to determine the condition of the courts' dockets, identify trends in case filings and in the demands being placed on the courts' resources, and identify the principal causes of cost and delay in civil litigation within each district.² The advisory groups also are to recommend measures, rules, and programs to address the principal causes of cost and delay which they identify.³ After consideration of the recommendations of its advisory group, each district court is to adopt a "civil justice expense and delay reduction plan," the purposes of which are to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."⁴

The district courts that developed and implemented a civil justice expense and delay reduction plan by December 31, 1991, were eligible for additional resources for the implementation of their plans.⁵ Thirty-four district courts met this deadline and were designated as "early implementation district courts."⁶ The civil justice expense and delay reduction plans adopted by these courts call for greatly increased judicial management of the pre-

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¹ Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (Title I of the Judicial Improvements Act of 1990) [hereinafter CJRA].

² 28 U.S.C. § 472(c)(1)(A)-(C) (Supp. III 1992).

³ *Id.* § 472(b)(3).

⁴ *Id.* § 471.

⁵ Pub. L. No. 101-650, § 103(c), 104 Stat. 5089, 5096 (1990).

⁶ JUDICIAL CONFERENCE OF THE U.S., CIVIL JUSTICE REFORM ACT REPORT: DEVELOPMENT AND IMPLEMENTATION OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT COURTS 2 (June 1, 1992) [hereinafter CJRA REPORT].

trial and trial process and, by and large, commit the judges in these districts to a much more active role in the civil litigation process. Twenty-eight of the thirty-four early implementation districts adopted some form of early and ongoing control of the pre-trial process by a judicial officer.⁷ All thirty-four of the early implementation districts required "discovery-case management conferences" in their civil expense and delay reduction plans.⁸

The efforts to control litigation expense and delay, to which district courts have committed themselves in their plans, will require a major investment of judicial resources. A resource to which many courts have turned for help in the implementation of civil justice reform is the United States magistrate judge.⁹ Indeed, eight of the thirty-four early implementation districts have requested additional magistrate judge positions to help them implement their plans.¹⁰

This Article considers the role of the United States magistrate judge in civil justice reform and, more specifically, the role that the early implementation districts envision for magistrate judges within their own districts. Part I briefly considers the evolution of the office of magistrate judge prior to the enactment of the Judicial Improvements Act of 1990. Part II addresses the treatment of magistrate judges under that legislation. Next, Part III recounts the roles assigned to magistrate judges under the Civil Justice Reform Act in the individual district courts. These varying uses of magistrate judges then will be critiqued in Part IV of the Article, which considers the optimal uses of magistrate judges in civil justice reform.

As this Article will demonstrate, the Civil Justice Reform Act caused individual district courts to reconsider the role played by magistrate judges in the administration of civil justice. Commentators have quite rightly noted the changes wrought by the CJRA in civil case management, discovery, and alternative dispute resolution.¹¹ However, a more subtle, but potentially more far-reach-

⁷ *Id.* at Exhibit B.

⁸ *Id.*

⁹ Prior to December 1, 1990, federal magistrate judges were referred to as federal "magistrates." See 28 U.S.C. §§ 631-639 (1988 and Supp. III 1992). Throughout this Article, these officials will be referred to as magistrate judges, their current title. Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117 (1990).

¹⁰ CJRA REPORT, *supra* note 6, at 18. Several districts concluded that magistrate judges should be entitled to two, rather than one, judicial law clerks. *Id.*

¹¹ Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. Rev. 445 (1992); Mary B. McManamon, *Is the Recent Frenzy of Civil Justice Reform a*

ing, change resulting from the CJRA may be the changed role for magistrate judges within many federal district courts.

I. THE OFFICE OF UNITED STATES MAGISTRATE JUDGE

In the Federal Magistrates Act of 1968,¹² Congress established the office of United States magistrate.¹³ This Act was amended in 1976 to clarify the power of magistrates to hear habeas corpus and prisoner civil rights actions, to review administrative determinations of Social Security benefits, and to issue reports and recommendations concerning motions to dismiss and for summary judgment.¹⁴ Three years later, Congress enacted the Federal Magistrate Act of 1979,¹⁵ the purpose of which was to "improve access to the Federal courts by enlarging the civil and criminal jurisdiction of United States magistrates."¹⁶ In particular, the 1979 Act for the first time permitted magistrates, with the con-

Cure-all or a Placebo? An Examination of the Plans of Two Pilot Districts, 11 REV. LITIG. 329 (1992); Linda S. Mullenix, *The Counter-Reformation in Procedural Reform*, 77 MINN. L. REV. 375 (1992) [hereinafter Mullenix, *The Counter-Reformation in Procedural Reform*]; Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing A Cost and Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 REV. LITIG. 165 (1992); Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105 (1991); Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115 (1991); William K. Slate II, *Early Implementation Districts: Pioneers and a Plethora of New Local Rules*, 11 REV. LITIG. 367 (1992); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992) [hereinafter Tobias, *Civil Justice Reform*]; Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49 (1992).

¹² Pub. L. No. 90-578, 82 Stat. 1108 (1968) (codified as amended at 28 U.S.C. §§ 604, 631-639 and 18 U.S.C. §§ 3060, 3401-3402 (1988 and Supp. III 1992)). See generally Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565 (analyzing history and provisions of Act); Richard W. Peterson, *The Federal Magistrates Act: A New Dimension in the Implementation of Justice*, 56 IOWA L. REV. 62 (1970) (same).

¹³ See *supra* note 12. Prior to 1968, United States commissioners helped federal district judges with minor tasks in connection with the criminal caseload. Peterson, *supra* note 12, at 66-71. The Federal Magistrate Act was enacted in response to dissatisfaction with the office of United States commissioner. Linda J. Silberman, *Masters and Magistrates, Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1297-98 (1975).

¹⁴ Pub. L. No. 94-577, 90 Stat. 2729 (1976) (codified at 28 U.S.C. § 636(b) (1988)); see S. REP. NO. 625, 94th Cong., 2d Sess. 3-4 (1976), reprinted in 1975 U.S.C.C.A.N. 6162, 6162-63.

¹⁵ Pub. L. No. 96-82, 93 Stat. 643 (1979). See generally Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 401 (1979).

¹⁶ Pub. L. No. 96-82, 93 Stat. 643 (1979) (purpose clause).

sent of the parties, to handle all pretrial and trial matters and enter final judgment in a civil case.¹⁷

Section 636 of title 28 of the United States Code defines the jurisdiction and powers of magistrate judges.¹⁸ This statutory section provides authority for magistrate judges to perform wide-ranging duties involving both criminal and civil cases. One magistrate judge has described his experience as ranging "from conducting a twenty-one minute bench trial of an illegal parking charge to presiding over a twenty-one day non-jury patent trial, sitting as a master."¹⁹

Magistrate judges have "all powers and duties conferred or imposed upon United States commissioners."²⁰ Pursuant to this provision, magistrate judges have the power to issue search and arrest warrants,²¹ handle criminal complaints,²² preside at initial appearances in criminal cases,²³ appoint counsel for indigent criminal defendants,²⁴ conduct preliminary examinations to determine whether there is probable cause to hold a criminal defendant for further proceedings,²⁵ hold extradition hearings,²⁶ and handle grand jury proceedings.²⁷ In addition, a district court can designate a magistrate judge to try and to sentence defendants charged with misdemeanors if the parties consent.²⁸ Thus, magistrate judges typically handle misdemeanor proceedings and pretrial matters in federal felony cases. However, the Federal Magistrate Act does not permit magistrate judges to try criminal felony cases.²⁹

¹⁷ Pub. L. No. 96-82, § 2, 93 Stat. 643, 643 (1979) (codified as amended at 28 U.S.C. § 636(c) (1988 and Supp. III 1992)).

¹⁸ For a detailed analysis of the jurisdiction and powers of magistrate judges, see ADMIN. OFFICE OF THE U.S. COURTS, INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES (1991) [hereinafter INVENTORY OF DUTIES].

¹⁹ Jack B. Streepy, *The Developing Role of the Magistrate in the Federal Courts*, 29 CLEV. ST. L. REV. 81, 81 n.* (1980).

²⁰ 28 U.S.C. § 636(a)(1) (1988).

²¹ FED. R. CRIM. P. 4, 41.

²² FED. R. CRIM. P. 3.

²³ FED. R. CRIM. P. 5, 58(b)(2).

²⁴ 18 U.S.C. § 3006A(b) (1988).

²⁵ *Id.* § 3060; FED. R. CRIM. P. 5.1.

²⁶ 18 U.S.C. § 3184 (Supp. III 1991).

²⁷ FED. R. CRIM. P. 6.

²⁸ 18 U.S.C. § 3401 (1988); FED. R. CRIM. P. 58.

²⁹ *Gomez v. United States*, 490 U.S. 858, 871-72 (1989). In contrast to district judges who are appointed by the President and confirmed by the Senate, full-time magistrate judges are appointed by the district judges in each district and serve for eight-year renewable terms. 28 U.S.C. § 631 (Supp. III 1993). The Supreme Court in

In addition to these duties in connection with criminal cases, magistrate judges are authorized to undertake various civil case duties. Pursuant to section 636(b)(1)(A) of title 28, a district judge may designate a magistrate judge to hear "any pretrial matter," except for certain dispositive motions such as motions for summary judgment, for injunctive relief, for class certification, and to dismiss. A district judge may reconsider the magistrate judge's ruling on such pretrial matters, but only if the order is "clearly erroneous or contrary to law."³⁰

Matters that a magistrate judge cannot hear under section 636(b)(1)(A), as well as prisoner petitions seeking post-conviction relief or challenging conditions of confinement, can be referred to a magistrate judge for consideration and the submission of a report and recommendation to the district judge.³¹ If a party objects to the magistrate judge's proposed findings and recommendations within ten days, the district judge is to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."³² Magistrate judges also can be designated to serve as special masters³³ and "may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."³⁴

With the consent of the parties, a magistrate judge "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves."³⁵ Parties who consent to the exercise of magistrate judge

Gomez concluded that magistrate judges have no statutory authority to preside over jury selection in a felony trial, but reserved judgment on the constitutionality of any such delegation of authority to magistrate judges. 490 U.S. at 872 n.25.

³⁰ 28 U.S.C. § 636(b)(1)(A) (1988); *see* FED. R. CIV. P. 72(a) (appeal from magistrate judge's order on nondispositive matters).

³¹ 28 U.S.C. § 636(b)(1)(B) (1988).

³² *Id.* § 636(b)(1); *see* FED. R. CIV. P. 72 (b).

³³ 28 U.S.C. § 636(b)(2) (1988); *see* FED. R. CIV. P. 53 (appointment and powers of master).

³⁴ 28 U.S.C. § 636(b)(3) (1988). For a compilation of duties assigned magistrate judges in various district courts, *see* INVENTORY OF DUTIES, *supra* note 18.

³⁵ 28 U.S.C. § 636(c)(1) (1988). While full-time magistrate judges typically hear civil cases pursuant to this provision, part-time magistrate judges who serve as full-time judicial officers may exercise civil case jurisdiction if the parties so request in writing, the magistrate judge has been a member in good standing of the bar for at least five years, and the chief district judge certifies that no full-time magistrate judge is reasonably available. *Id.*

The parties typically are informed of their right to consent to the exercise of magistrate judge jurisdiction at the time the case is filed. 28 U.S.C. § 636(c)(2) (Supp.

jurisdiction can either (1) appeal the magistrate judge's judgment directly to the court of appeals just as if the judgment had been entered by a district judge³⁶ or (2) consent to appeal to a district judge "in the same manner as on an appeal from a district court judgment to the court of appeals."³⁷ Thus, if the parties waive their right to have their civil case heard by an Article III judge, a magistrate judge so designated can exercise the same jurisdiction as a district judge.

Although the office of magistrate judge is established by federal statute, the duties of specific magistrate judges are determined within each judicial district. Professor Leo Levin, while Director of the Federal Judicial Center, noted:

Judges in each district court, constrained only by the guidelines set forth in the 1968 act and the Federal Magistrate Acts of 1976 and 1979, establish the responsibilities and duties of their magistrates. To gain a better understanding of the various tasks current magistrates have been designated to perform and to gain a better appreciation of those they are actually assigned, it is necessary to examine the work of individual magistrates in their respective courts.³⁸

On behalf of the Federal Judicial Center, Professor Carroll Seron conducted a study during the early 1980s of the roles performed by magistrate judges in nine district courts.³⁹ Based upon the results of this study, Seron concluded that there were three basic models of magistrate judge use: (1) the magistrate as an ad-

1992); Fed. R. Civ. P. 73(b); see Form 33 from the Appendix of Forms to the Fed. R. Civ. P. ("Notice of Right to Consent to the Exercise of Civil Jurisdiction by a Magistrate and Appeal Option"). Under the amendment to section 636(c)(2) contained in the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 308, 104 Stat. 5089, 5112 (1990), the district judge or magistrate judge may again inform the parties of their right to consent to magistrate judge jurisdiction, "but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences." 28 U.S.C. § 636(c)(2) (Supp. III 1992).

³⁶ 28 U.S.C. § 636(c)(3) (1988).

³⁷ *Id.* § 636(c)(4). The procedure for appeals from judgments of magistrate judges to district judges are set forth in Rules 74, 75, and 76 of the Federal Rules of Civil Procedure.

³⁸ A. Leo Levin, *Foreword to CARROLL SERON, THE ROLES OF MAGISTRATES IN FEDERAL DISTRICT COURTS* vii (1983).

³⁹ CARROLL SERON, *THE ROLES OF MAGISTRATES: NINE CASE STUDIES* (1985) [hereinafter SERON, *NINE CASE STUDIES*]. Professor Seron previously had conducted a survey of full-time magistrate judges, seeking information about the tasks that magistrate judges performed. SERON, *supra* note 38. For a more recent study of magistrate judges, see CHRISTOPHER E. SMITH, *UNITED STATES MAGISTRATES IN THE FEDERAL COURTS* (1990).

ditional judge, handling his or her own civil caseload; (2) the magistrate as a specialist, either in particular types of cases (such as social security cases or prisoner petitions) or in certain aspects of pretrial case management (such as discovery disputes in complex cases or settlement conferences); and (3) the magistrate judge as a team player, hearing all pretrial matters and presenting a district judge with a case that is ready to be tried.⁴⁰ Professor Seron also found that, within individual districts, not all magistrate judges were used in the same fashion.⁴¹

II. MAGISTRATE JUDGES UNDER THE JUDICIAL IMPROVEMENTS ACT OF 1990

The Judicial Improvements Act of 1990 has two nonlegislative precursors: the 1989 report of the Brookings Institution Task Force on Civil Justice Reform and the 1990 report of the Federal Courts Study Committee. Both the Brookings Task Force and the Federal Courts Study Committee offered major recommendations concerning the role that magistrate judges should play in the federal civil litigation process.

A. *The Brookings Institution Task Force on Civil Justice Reform*

Title I of the Judicial Improvements Act of 1990, the Civil Justice Reform Act, had its genesis in the report *Justice for All* issued by the Brookings Institution Task Force on Civil Justice Reform. In this 1989 report, the Brookings Task Force concluded: "The excessive cost and delay associated with litigating civil cases in America should no longer be tolerated and can be forcefully addressed through procedural reform, more active case management by judges, and better efforts by attorneys and their clients to control cost and delay."⁴²

The Brookings Task Force recommended that each federal district court adopt a "civil justice reform plan," which should include requirements for assigning cases to different litigation tracks based upon their complexity, mandatory pretrial conferences, and procedures for resolving motions quickly.⁴³ The Task

⁴⁰ SERON, NINE CASE STUDIES, *supra* note 39, at 35-36.

⁴¹ SERON, NINE CASE STUDIES, *supra* note 39, at 41-45.

⁴² Task Force on Civil Justice Reform, The Brookings Institution, *Justice for All* 3 (1989).

⁴³ *Id.*

Force also recommended that federal judges become more active case managers and that the federal judiciary be provided with the resources to make such active case management possible.⁴⁴

It is unclear exactly what role the Brookings Task Force expected magistrate judges to play under the procedural system envisioned in its report. Some of the Task Force recommendations appear to contemplate a possible role for magistrate judges; for instance, the Task Force recommended that parties in most cases be required to assess the suitability of alternative dispute resolution procedures at a conference "with a neutral court representative."⁴⁵

While the role magistrate judges were to play in implementing the reforms recommended in *Justice for All* is unclear, the Brookings Task Force was very specific concerning roles it did not want magistrate judges to play. The Task Force recommended that "judges should take a more active role in managing their cases, ending the practice in some courts of delegating to magistrates functions that are in fact better performed by judges."⁴⁶ Specifically, the Task Force recommended that each district be required to adopt mandatory scheduling conferences "presided over by judges and not magistrates."⁴⁷

Indeed, Procedural Recommendation 11, one of the Task Force's twelve specific recommendations, is to "[e]nsure in each district's [civil justice reform plan] that magistrates do not perform tasks best performed by the judiciary."⁴⁸ The rationale for this recommendation is as follows:

Magistrates can and do fulfill a valuable function in alleviating judges' work loads by performing many critical nonjudicial tasks, especially for routine litigation. At the same time, however, the task force believes that a number of federal district courts are relying too heavily on magistrates in civil cases to conduct certain tasks that are properly reserved to judges

⁴⁴ *Id.* The additional resources recommended included "resources to computerize [the courts'] administrative support system . . . , to raise judicial salaries, . . . to spread information about effective judicial management techniques," and to fill judicial vacancies and, in some districts, possibly create new judgeships. *Id.*

⁴⁵ *Id.* at 23. However, the Task Force report does not specifically refer to magistrate judges as within the scope of "neutral court representative[s]," but instead cites to the use of volunteer attorneys in the early neutral evaluation program in the Northern District of California. *Id.*

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* at 24.

⁴⁸ *Id.* at 28.

[T]he notion that by assuming core judicial functions magistrates can economize on judicial resources is fundamentally flawed. Decisions by magistrates on matters of importance—for example, summary judgment motions—are often appealed to the supervising judge, requiring the parties to brief and argue the same questions twice. In addition, active judicial management of cases can prevent lengthy disputes between counsel for the parties before magistrates over minor procedural issues.⁴⁹

Justice for All therefore envisions a subordinate status for magistrate judges, whatever the specific roles they might play in particular districts. Even the language of the Task Force's magistrate judge recommendation contemplates a subordinate status for magistrate judges. While the recommendation might have specified that magistrate judges should not perform tasks best performed by the "Article III judiciary" or "district judges," instead, Procedural Recommendation 11 refers to "the judiciary" — thereby implying that magistrate judges are not included in that select group.

While *Justice for All* relies upon a Harris survey to support many of its recommendations,⁵⁰ there is no empirical evidence or other authority cited in support of its recommendations concerning the role of magistrate judges.⁵¹ Furthermore, the Brookings Task Force did not include among its thirty-six members any sitting federal judge.⁵² The Judicial Conference of the United States opposed the bill introduced by Senator Biden based upon the Brookings Task Force report, resulting in significant changes between the original "Biden Bill" and the Civil Justice Reform Act of 1990 as eventually enacted.⁵³

⁴⁹ *Id.*

⁵⁰ Louis Harris and Associates, Inc., *Procedural Reform of the Civil Justice System* (1989).

⁵¹ The Harris survey relied upon by the Brookings Task Force had asked whether "excessive referral by judges of discovery matters to magistrates" was a cause of high litigation transaction costs or delays. *Id.* at 33. Only 4 to 5% of the groups of attorneys and 9% of the federal judges surveyed found this to be a "major cause" of costs or delays. *Id.*

⁵² "That federal judges were excluded from the Brookings-Biden task force and not consulted in promulgating this legislation is astonishing: apparently the Senate's definition of the system's users does not include the federal judges who sit and hear cases." Mullenix, *The Counter-Reformation in Procedural Reform*, *supra* note 11, at 438; see also Robel, *supra* note 11, at 117.

⁵³ The primary difference between the CJRA as ultimately enacted and the bill initially introduced by Senator Biden is that, while all courts must consider certain specific litigation management and cost and delay reduction principles, guidelines, and techniques, most courts are not required by the CJRA to adopt any of these par-

B. The Report of the Federal Courts Study Committee

In its 1990 report, the Federal Courts Study Committee made three specific recommendations concerning federal magistrate judges based upon its conclusion that "the role of the magistrate must continue to be supportive and flexible."⁵⁴ The Committee recommended that 28 U.S.C. § 636(c)(2) be amended to permit district judges and magistrate judges to remind the parties of their right to consent to civil trials before magistrate judges.⁵⁵ This recommendation was encompassed in the Federal Courts Study Committee Implementation Act of 1990, which amended section 636(c)(2).⁵⁶ As a result, this section now provides that, after the clerk's initial notification to the parties of the availability of a magistrate judge to exercise civil jurisdiction, "either the district court judge or the magistrate may again advise the parties of the availability of the magistrate."⁵⁷

The Federal Courts Study Committee also recommended that the United States Judicial Conference authorize a study of the constitutional limits of magistrate judges' jurisdiction and catalogue magistrate judge duties.⁵⁸ In response to this recommendation, the Judicial Conference has produced two reports dealing with the constitutional authority of magistrate judges and the duties assigned to them.⁵⁹

Finally, the Federal Courts Study Committee recommended that Congress establish a \$10,000 jurisdictional minimum for federal tort claims and possibly federal contract and debt cases.⁶⁰ In conjunction with this jurisdictional minimum, the Committee further recommended that Congress establish a federal small claims procedure to entertain claims falling below \$10,000. The Committee did not recommend the specific contours of the small claims

titular principles, guidelines, and techniques. 28 U.S.C. § 473(a) (Supp. III 1992); see S. 2027, 101st Cong., 2d Sess. § 3 (1990) (proposed 28 U.S.C. § 471(b)).

⁵⁴ Fed. Courts Study Comm., *Report of the Federal Courts Study Committee* 79 (1990).

⁵⁵ *Id.* at 79-80.

⁵⁶ Pub. L. No. 101-650, § 308, 104 Stat. 5089, 5112 (1990). The Federal Courts Study Committee Implementation Act is Title III of the Judicial Improvements Act of 1990. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

⁵⁷ 28 U.S.C. § 636(c)(2) (Supp III 1992).

⁵⁸ Fed. Courts Study Comm., *supra* note 54, at 80-81.

⁵⁹ Admin. Office of the U.S. Courts, *A Constitutional Analysis of Magistrate Judge Authority* (1992), reprinted in 150 F.R.D. 247 (1993); INVENTORY OF DUTIES, *supra* note 18.

⁶⁰ Fed. Courts Study Comm., *supra* note 54, at 81.

procedure, but suggested that one possible manner in which such claims might be handled would be to assign them to federal magistrate judges.⁶¹

While the Committee encouraged "the adoption of procedures that will make efficient and appropriate the utilization of magistrates as auxiliary officers of the district court," it noted that if "the position of magistrate becomes an autonomous judicial office, magistrates will no longer be able to assist district court judges."⁶²

C. *The Judicial Improvements Act of 1990*

Major recommendations of both the Brookings Institution Task Force and the Federal Courts Study Committee were enacted by Congress in the Judicial Improvements Act of 1990.⁶³ Title I of this Act, the Civil Justice Reform Act of 1990, is based upon the Brookings Institution Task Force report and requires all ninety-four federal district courts to adopt a civil justice expense and delay reduction plan.⁶⁴ This title of the Judicial Improvements Act was vigorously opposed by the United States Judicial Conference.⁶⁵ As a result, while each district court must consider specific "principles and guidelines of litigation management and cost and delay reduction" and "litigation management and cost and delay reduction techniques,"⁶⁶ most district courts are not required to adopt such principles and guidelines or techniques in their expense and delay reduction plans.⁶⁷

⁶¹ Fed. Courts Study Comm., *supra* note 54, at 81.

⁶² Fed. Courts Study Comm., *supra* note 54, at 79; see Judicial Conference of the U.S., *The Federal Magistrates System* 19 (1981) ("Magistrates are an important judicial resource supplementing the judges of the district bench and enabling the court as a whole to provide greater service to the bar and to litigants.").

⁶³ Pub. L. No. 101-650, 104 Stat. 5089 (1990).

⁶⁴ Pub. L. No. 101-650, § 103, 104 Stat. 5089, 5090 (1990) (codified at 28 U.S.C. §§ 471-482 (Supp. III 1992)).

⁶⁵ *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 319 (1990) (statement of Judge Robert F. Peckham on behalf of Judicial Conference of United States); see S. REP. NO. 416, 101st Cong., 2d Sess. 9 (1990).

⁶⁶ 28 U.S.C. § 473(a), (b) (Supp. III 1992).

⁶⁷ *Id.* However, ten "pilot districts" are required to include the six principles and guidelines of litigation management and cost and delay reduction in their expense and delay reduction plans. Pub. L. No. 101-650, § 105(b)(1), 104 Stat. 5089, 5097 (1990). These pilot districts are to be studied by the Judicial Conference, which is to consider whether to recommend that other districts be required to include these principles and guidelines in their expense and delay reduction plans. Pub. L. No. 101-650, § 105(c), 104 Stat. 5089, 5098 (1990).

The Brookings Institution recommendations concerning magistrate judges were not enacted as part of the CJRA. While early judicial case management must be considered by each federal district court, the statute refers to early control of the pretrial process by a "judicial officer" (either a district or magistrate judge), rather than by a district judge.⁶⁸ Similarly, the discovery-case management conferences that the district courts must consider are to be conducted by the "presiding judicial officer."⁶⁹

This statutory language represents a significant change from the provisions of the bill originally introduced by Senator Biden. The original "Biden Bill" provided for mandatory discovery-case management conferences and complex litigation-monitoring conferences "presided over by a judge and not a magistrate."⁷⁰ Both the National Council of United States Magistrates and the Judicial Conference of the United States successfully opposed these restrictions on the civil case management powers of magistrate judges envisioned by the Brookings Institution Task Force and the original "Biden Bill."⁷¹

Many of the recommendations of the Federal Courts Study Committee were included in the Federal Courts Study Committee Implementation Act of 1990, which was enacted as Title III of the Judicial Improvements Act of 1990.⁷² Title III adopted the recommendation of the Federal Courts Study Committee to permit judges to remind the parties of their right to consent to magistrate judge jurisdiction.⁷³ In addition, the Federal Courts Study Committee Implementation Act changed the name "magistrate" to "United States magistrate judge."⁷⁴

Although the Brookings Institution Task Force on Civil Justice Reform recommended a clearly subordinate role for magis-

⁶⁸ 28 U.S.C. § 473(a)(2) (Supp. III 1992).

⁶⁹ *Id.* § 473(a)(3).

⁷⁰ S. 2027, 101st Cong., 2d Sess. § 3 (1990) (proposed 28 U.S.C. § 471(b)(3), (b)(3)(I)).

⁷¹ The involvement of magistrate judges, the National Council of United States Magistrates, and the Judicial Conference of the United States in the legislative process surrounding the Judicial Improvements Act of 1990 has been recounted in Christopher E. Smith, *Judicial Lobbying and Court Reform: U.S. Magistrate Judges and the Judicial Improvements Act of 1990*, 14 U. ARK. LITTLE ROCK L.J. 163 (1992).

⁷² Pub. L. No. 101-650, 104 Stat. 5089 (1990).

⁷³ Pub. L. No. 101-650, § 308, 104 Stat. 5089, 5112 (1990) (amending 28 U.S.C. § 636(c)(2) (Supp. III 1992)).

⁷⁴ Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117 (1990).

trate judges in federal civil litigation,⁷⁵ the Judicial Improvements Act of 1990, which adopted so many of the Task Force's other recommendations, actually enhanced the potential role and status of federal magistrate judges. In its report on the Judicial Improvements Act, the Senate Judiciary Committee concluded that "magistrates can and should play an important role, particularly in the pretrial and case management process."⁷⁶ Whether this potential is realized in practice will depend, in large measure, upon the implementation of the CJRA in the ninety-four federal district courts.

III. MAGISTRATE JUDGES AND CIVIL JUSTICE REFORM IN THE DISTRICT COURTS

The Civil Justice Reform Act advisory group reports and the expense and delay reduction plans provide unique vantage points concerning the role of magistrate judges in the federal judicial system. This Part of the Article considers the reports and plans adopted in the thirty-four early implementation district courts. It is not a comprehensive analysis of every aspect of these reports and plans that deal with magistrate judges. Instead, this Part sketches with broad strokes the magistrate judge provisions in the thirty-four early implementation districts' advisory group reports and civil justice expense and delay reduction plans.⁷⁷ To obtain a complete picture of magistrate judge utilization in these districts will require a future assessment of the duties actually performed by magistrate judges under the new plans.

While the advisory groups and district courts have reached different conclusions concerning the most effective use of magistrate judges in their districts, magistrate judges generally have been viewed as having a significant role to play in solving the perceived problems that the CJRA was intended to address.⁷⁸ The

⁷⁵ See *supra* text accompanying notes 42-53.

⁷⁶ S. REP. NO. 416, 101st Cong., 2d Sess. 20 (1990).

⁷⁷ In addition to the early implementation districts, Part III considers advisory group reports and expense and delay reduction plans in three other districts: the Western District of Missouri, the Eastern District of Tennessee, and the Western District of Texas.

⁷⁸ This view may have been fostered by the Administrative Office of the United States Courts, which sent the advisory groups two separate documents concerning magistrate judge jurisdiction and utilization. Admin. Office of the U.S. Courts, MAGISTRATE JUDGE JURISDICTION AND UTILIZATION (1991) [hereinafter MAGISTRATE JUDGE JURISDICTION AND UTILIZATION]; INVENTORY OF DUTIES, *supra* note 18. In the cover memorandum to the second document, the Director of the Administrative Office in-

roles for magistrate judges in the early implementation districts can be classified under the three basic models of magistrate judge use identified by Professor Carroll Seron: team player, specialist, or additional judge.⁷⁹

A. *Magistrate Judges as Team Players*

If the recommendation of the Brookings Institution Task Force that district judges should manage their own cases were adopted in the federal courts, it would affect the role of magistrate judges as "team players." To the extent that district judges themselves become actively involved in pretrial case management, they may undertake duties otherwise performed by magistrate judges. However, the civil justice expense and delay reduction plans generally do not mandate that district, rather than magistrate, judges be the judicial officers who engage in the "early and ongoing control of the pretrial process" contemplated by the CJRA.⁸⁰

This is not to say that some advisory groups have not endorsed early judicial involvement by district judges. The advisory group for the District of Kansas made the following finding: "Case management is the non-delegable responsibility of each district judge maintaining a caseload within the District of Kansas. Judges may assign portions of the case management authority to magistrate judges or parajudicial personnel, but the final responsibility for case management remains with the district judge."⁸¹

The expense and delay reduction plan in the District of Massachusetts similarly requires that the scheduling conferences mandated by that plan be held by district judges:

This was thought more likely to produce a more reliable schedule because if the process were handled by a magistrate judge, the district judge, whose schedule ultimately will determine when the case is tried, might be more likely to revise it or be more re-

formed the chairpersons of advisory groups: "It is hoped that this document will be helpful to you and your group in considering how magistrate judges can participate in the court's expense and delay reduction plan." Memorandum from L. Ralph Mecham to Chairpersons of Advisory Groups Appointed under the Civil Justice Reform Act (Dec. 27, 1991) (on file with author).

⁷⁹ SERON, NINE CASE STUDIES, *supra* note 39; see *supra* text accompanying notes 39-41.

⁸⁰ 28 U.S.C. § 473(a)(2) (Supp. III 1992).

⁸¹ REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE DIST. OF KAN. 46 (1991) [hereinafter CJRA REPORT, DIST. OF KAN.].

ceptive to an application for modification by a party who is unhappy with it.⁸²

Perceiving the same problem, the advisory group in the Western District of Oklahoma recommended that "a 'judicial officer' with authority to make the necessary scheduling and other procedural orders necessary to ensure a case's successful progress to trial be present at the status conference."⁸³

Such explicit preference for the involvement of district judges in the pretrial process is atypical of the advisory group reports and civil justice expense and delay reduction plans adopted in the early implementation districts.⁸⁴ The advisory group in the Eastern District of Virginia concluded that its court has not experienced undue expense or delay because, in part, of the "highly qualified magistrate judges who assume a substantial portion of the civil case management responsibilities."⁸⁵ As recognized in the plan of the Northern District of Indiana, "[m]agistrate judges may conduct pretrial conferences and discovery proceedings by designation by the district judge, 28 U.S.C. § 636(b)(1)(A), allowing judicial control of the pretrial process to continue even in

⁸² EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF MASS. 24 (1991) [hereinafter CJRA PLAN, DIST. OF MASS.]. However, this same expense and delay reduction plan provides that either district or magistrate judges may preside over case management conferences, regulate discovery, and resolve discovery disputes. *Id.* at 29, 34, 44, 38 (Rules 1.03; 2.01; 2.05; and 2.02(d)). *But see* REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE W. DIST. OF TENN. 36 (1991) [hereinafter CJRA REPORT, W. DIST. OF TENN.] ("Conferences with a magistrate judge who is not going to try the case . . . is [sic] often an exercise in futility.").

⁸³ REPORT OF THE ADVISORY GROUP APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE W. DIST. OF OKLA. 43-44 (1991) [hereinafter CJRA REPORT, W. DIST. OF OKLA.]. The requirement that the presiding judicial officer have such authority may be analogous to a requirement that parties must be represented at pretrial conferences by attorneys with authority to bind their clients. *See* 28 U.S.C. § 473(b)(2) (Supp. III 1992).

⁸⁴ *See, e.g.*, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF UTAH 3 (1991) [hereinafter CJRA PLAN, DIST. OF UTAH]; REPORT OF THE ADVISORY GROUP APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE S. DIST. OF ILL. 39 (1991) [hereinafter CJRA REPORT, S. DIST. OF ILL.]. The advisory group in the Southern District of Indiana recommended that, in cases in which pretrial proceedings are assigned to a magistrate judge, the parties advise the court if involvement by the district judge would be desirable. REPORT AND PROPOSED PLAN OF THE CIVIL JUSTICE ADVISORY GROUP, U.S. DIST. CT. FOR THE S. DIST. OF IND. 29 n.44 (1991) [hereinafter CJRA REPORT, S. DIST. OF IND.].

⁸⁵ REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE E. DIST. OF VA. 51 (1991).

the face of extended criminal trials or increased caseloads."⁸⁶ This view is consistent with the conclusion of the Senate Judiciary Committee that considered the CJRA: "[G]iven the increasingly heavy demands of the civil and criminal dockets and the increasingly high quality of the magistrates themselves, . . . magistrates can and should play an important role, particularly in the pretrial and case development process."⁸⁷

Under the expense and delay reduction plan in the District of Wyoming, magistrate judges conduct initial pretrial conferences at which case complexity is assessed and discovery schedules are set. District judges then set dates for hearing dispositive motions and trial.⁸⁸ Under a local rule proposed in its plan, magistrate judges in the District of New Jersey are generally responsible for pretrial case management and discovery.⁸⁹ The advisory group in the Western District of Michigan contemplated that in complex cases "a magistrate judge, as part of the judicial management team, will be assigned to assist the district judge as needed and as requested in the handling of the case."⁹⁰

In an effort to maximize utilization of magistrate judges as team players, some advisory groups have recommended a one-to-one ratio of magistrate to district judges so that magistrate judges can be paired with district judges.⁹¹ Magistrate judges then can work in conjunction with and under the supervision of specific dis-

⁸⁶ CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE N. DIST. OF IND. 49 (1991) [hereinafter CJRA PLAN, N. DIST. OF IND.]; *see id.* at 4 ("Because this district's magistrate judges have significant caseloads of their own through operation of the consent procedures of 28 U.S.C. § 636, this plan does not distinguish between district judges and magistrate judges.").

⁸⁷ S. REP. NO. 416, 101st Cong., 2d Sess. 20 (1990).

⁸⁸ CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF WYO. 7 (1991) [hereinafter CJRA PLAN, DIST. OF WYO.]. The expense and delay reduction plan in the Southern District of Illinois provides that the judge who will try the case is to preside at final, but not preliminary, pretrial conferences. CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN, U.S. DIST. CT. FOR THE S. DIST. OF ILL. 4-11 (1991) [hereinafter CJRA PLAN, S. DIST. OF ILL.].

⁸⁹ CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN FOR IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE DIST. OF N.J. 17-22 (1991) [hereinafter CJRA PLAN, DIST. OF N.J.] (Local Rule 15).

⁹⁰ REPORT OF THE ADVISORY GROUP APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE W. DIST. OF MICH. 144 (1991) [hereinafter CJRA REPORT, W. DIST. OF MICH.].

⁹¹ CJRA PLAN, DIST. OF MASS., *supra* note 82, at 14; REPORT OF THE ADVISORY GROUP ON THE REDUCTION OF COST AND DELAY IN CIVIL CASES, U.S. DIST. CT. FOR THE N. DIST. OF IND. 77 (1991) [hereinafter CJRA REPORT, N. DIST. OF IND.]; REPORT OF THE CIVIL JUSTICE ADVISORY GROUP, U.S. DIST. CT. FOR THE DIST. OF ALASKA 8 (1991) [hereinafter CJRA REPORT, DIST. OF ALASKA]; *see* REPORT AND PLAN BY THE CIVIL JUS-

trict judges, handling the tasks that district judges find most helpful in managing their caseloads. As the advisory group in the District of Massachusetts recognized, under such a pairing of judges the "ability [of the magistrate judge] to be consistent generates predictability and stability for the attorneys."⁹²

Several advisory groups criticized the use of magistrate judges as team players in situations where district judges ask magistrate judges to report and recommend rulings on dispositive motions. If, in a particular district, there are few appeals from magistrate judge rulings on motions, motion referrals may be an efficient case management technique.⁹³ However, in many districts there is the perception that the parties frequently appeal dispositive motion rulings of magistrate judges to district judges.⁹⁴

According to its advisory group, in the District of Utah magistrate judge rulings on dispositive motions are "almost always" appealed to a district judge.⁹⁵ The advisory group to this court

TICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE S. DIST. OF TEX., *reprinted in* 11 REV. LITIG. 203, 248, 251 (1992) [hereinafter CJRA REPORT, S. DIST. OF TEX.].

⁹² CJRA PLAN, DIST. OF MASS., *supra* note 82, at 14-15.

⁹³ Based upon her study of nine district courts, Professor Seron concluded that "in the majority of cases, parties are likely to accept the reports of magistrates." SERON, NINE CASE STUDIES, *supra* note 39, at 97. She found that the percentage of challenges to rulings on dispositive motions by magistrate judges ranged from 13% to 44% and averaged 24% in the nine districts studied. *Id.* For nondispositive motions, appeals to a district judge occurred in only 4% of the sampled cases. *Id.* at 102. The magistrate judges' rulings that were appealed were sustained by the district judges in at least 62% of the appeals involving dispositive motions and 60% of the cases involving nondispositive motions. *Id.* at 99, 103-04.

⁹⁴ The study conducted by Professor Seron suggests that this perception may be incorrect. SERON, NINE CASE STUDIES, *supra* note 39, at 97. Whether correctly founded or not, a similar perception concerning magistrate judge rulings on discretionary, nondispositive motions is not found in the advisory group reports. See REPORT OF THE CIVIL JUSTICE ADVISORY GROUP, U.S. DIST. CT. FOR THE W. DIST. OF TEX. 112 (1991) [hereinafter CJRA REPORT, W. DIST. OF TEX.] (District judges should refer nondispositive motions to magistrate judges because "the experience in districts that make extensive use of magistrate judges to resolve, for example, discovery motions is that parties seldom choose to incur the expense of challenging discretionary rulings on nondispositive motions").

⁹⁵ REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE, U.S. DIST. CT. FOR THE DIST. OF UTAH 54 n.40 (1991) [hereinafter CJRA REPORT, DIST. OF UTAH].

Although the standard of review for an appeal from a magistrate judge's report and recommendation concerning a dispositive motion is *de novo*, 28 U.S.C. § 636(b)(1) (1988), "[n]ormally, the [district] judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record . . ." H.R. REP. NO. 1609, 94th Cong., 2d Sess. 3 (1976). While duplication of judicial (and legal) effort exists when motion decisions are appealed to a

therefore criticized the practice of referring dispositive motions to magistrate judges because of the needs to "(1) rebrief the matter in its entirety for the appeal, and (2) wait a second time for a decision."⁹⁶ The advisory group also noted the additional judicial time inherent in such a process and that magistrate judges, unlike district judges, cannot rule from the bench but must prepare written motion opinions.⁹⁷ The advisory group in the Southern District of Florida concluded that, because "it is almost a certainty that the losing party will appeal the magistrate's order" on a dispositive

district judge, the work for any particular district judge usually is significantly lessened by referral of a dispositive motion to a magistrate judge. District judges, therefore, may be more interested in the referral of motions to magistrate judges than are attorneys, litigants, or others. Thus, while the advisory group to the United States District Court for the District of Utah recommended against referral of dispositive motions to magistrate judges, CJRA REPORT, DIST. OF UTAH, *supra*, at 53-54, this recommendation was not included in the civil expense and delay reduction plan adopted by the district judges in that district. CJRA PLAN, DIST. OF UTAH, *supra* note 84.

⁹⁶ CJRA REPORT, DIST. OF UTAH, *supra* note 95, at 54; see CIVIL JUSTICE REFORM ACT OF 1990: ADVISORY GROUP REPORT AND RECOMMENDED PLAN, U.S. DIST. CT. FOR THE DIST. OF WYO. 48 (1991) [hereinafter CJRA REPORT, DIST. OF WYO.]. The advisory group in the Eastern District of Tennessee concluded that "it does not make sense to the Advisory Group for the magistrate judges to so often serve as a lower level trial court, from which parties routinely take appeals to the district judges." REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE E. DIST. OF TENN. 40 (1992) [hereinafter CJRA REPORT, E. DIST. OF TENN.]. In an attempt to solve this problem, this Advisory Group recommended that dispositive motions be accompanied by a certificate that counsel have conferred concerning party consent to the final resolution and entry of judgment on the dispositive motion by a magistrate judge. *Id.* at 61-63.

⁹⁷ CJRA REPORT, DIST. OF UTAH, *supra* note 95, at 54. One approach to this problem has been adopted in the Eastern District of New York, where magistrate judges need only prepare a "written exposition" of a discovery order if the order is appealed to a district judge. This "written exposition" "may take the form of an oral order read into the record of a deposition or other proceeding." REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE E. DIST. OF N.Y. (1991) [hereinafter CJRA REPORT, E. DIST. OF N.Y.] (Exhibit V-2 (*Standing Orders on Effective Discovery* II(5)(c))).

A similar problem of duplication of judicial effort was perceived by the advisory group in the District of Wyoming in connection with magistrate judge proposed findings and recommendations in habeas corpus cases. CJRA REPORT, DIST. OF WYO., *supra* note 96, at 74. While recognizing that "this procedure may be contrary to the provisions of 28 U.S.C. 636(b)(1)(B)," the advisory group recommended that the court weigh the benefits of its current procedure under which, rather than issuing proposed findings and recommendations, the magistrate judge merely prepares a proposed order for the district judge. *Id.*

motion, "the magistrate has become a very experienced and higher paid law clerk."⁹⁸

Due to these perceived problems, several advisory groups have recommended against the referral of dispositive motions to magistrate judges. In the Eastern District of Wisconsin, the district judges have adopted an advisory group recommendation that they not refer dispositive motions to magistrate judges "except in the most unusual of circumstances."⁹⁹ The expense and delay reduction plan in the Northern District of Ohio similarly provides: "Motions that dispose of any claim or defense shall usually be heard and determined by the District Judge assigned to the case."¹⁰⁰

Other districts have tried to reduce appeals from rulings of magistrate judges in other ways. In the Southern District of New York, the court addressed the perceived problem of appeals from the rulings of magistrate judges in the following provision of its expense and delay reduction plan: "Appeals from discovery rulings by magistrate judges on discretionary issues are disfavored. Judges will not hesitate to award sanctions for frivolous appeals from such rulings."¹⁰¹ For cases subject to the Case Management Pilot Program in the Northern District of California, no responses need be filed in connection with motions asking a district judge to reconsider magistrate judge discovery rulings unless ordered by the district judge.¹⁰² The district judge may deny such a motion by written order at any time, but shall not grant the motion without giving the opposition an opportunity to brief the matter.¹⁰³ Moreover, "[i]f no order denying the motion or setting a briefing schedule is made within 15 calendar days of the filing of the motion, the motion shall be deemed denied."¹⁰⁴

⁹⁸ CIVIL JUSTICE ADVISORY GROUP, U.S. DIST. CT. FOR THE S. DIST. OF FLA. 48 (1991) [hereinafter CJRA REPORT, S. DIST. OF FLA.]

⁹⁹ CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE E. DIST. OF WIS. 22 (1991) [hereinafter CJRA PLAN, E. DIST. OF WIS.].

¹⁰⁰ DIFFERENTIATED CASE MANAGEMENT PLAN, U.S. DIST. CT. FOR THE N. DIST. OF OHIO 45 (1991) [hereinafter CJRA PLAN, N. DIST. OF OHIO]. *But see* CJRA REPORT, S. DIST. OF ILL., *supra* note 84, at 10 (1991) (recommending increased use of magistrate judges to hear pretrial motions).

¹⁰¹ CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE S. DIST. OF N.Y. 5 (1991).

¹⁰² U.S. Dist. Court for the N. Dist. of Cal., *General Order No. 34: Case Management Pilot Program* 3-4 (July 1, 1992).

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.*

Finally, the advisory group for the Western District of Michigan explicitly considered magistrate judges as team players, suggesting that magistrate judges, district judges, and case managers serve as "case management teams . . . who together will monitor the progress of every piece of civil litigation filed in the district after January 1, 1992."¹⁰⁵ The differentiated case management system adopted in the Northern District of Ohio also contemplates active involvement in the pretrial process by a "judicial officer" who can be either a district or magistrate judge.¹⁰⁶

B. Magistrate Judges as Specialists

While the role of magistrate judges as team players may decrease in some districts as district judges become more actively involved in pretrial case management, the CJRA reports and plans evidence a continued desire to use magistrate judges as specialists. The advisory group reports and the expense and delay reduction plans in several districts contemplate that magistrate judges will specialize in alternative dispute resolution and specific aspects of pretrial case management.¹⁰⁷

¹⁰⁵ CJRA REPORT, W. DIST. OF MICH., *supra* note 90, at 158.

¹⁰⁶ FINAL REPORT AND RECOMMENDATIONS, U.S. DIST. CT. FOR THE N. DIST. OF OHIO 28-39 (1991) [hereinafter CJRA REPORT, N. DIST. OF OHIO].

¹⁰⁷ Magistrate judges also will continue to handle "traditional" specialties under civil justice expense and delay reduction plans. In the Eastern District of Texas, magistrate judges will continue to handle social security cases and the large number of civil rights and post conviction relief claims filed by the many federal and state prisoners incarcerated within the district. REPORT OF THE ADVISORY GROUP APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE E. DIST. OF TEX. 24-25 (1991) [hereinafter CJRA REPORT, E. DIST. OF TEX.]; see REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE E. DIST. OF CAL. 21 (1991) [hereinafter CJRA REPORT, E. DIST. OF CAL.] (noting that more than 50% of California prison population is within Eastern District of California, and that district's magistrate judges average more than 350 prisoner cases per magistrate on their dockets); REPORT OF THE ADVISORY GROUP UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE E. DIST. OF ARK. 8 (1991) [hereinafter CJRA REPORT, E. DIST. OF ARK.] (noting that one-half of magistrate judges' time often spent dealing with prisoner petitions).

In other districts, particularly in the West, magistrate judges will continue to serve as "geographical specialists," holding court in cities in which no district judge is resident. *E.g.*, CJRA REPORT, E. DIST. OF CAL., *supra*, at 8-10 (stating that Eastern District of California has five full-time and ten part-time magistrate judges in twelve different locations throughout district). These magistrate judges sometimes are located in or near federal parks and hear claims arising from activities within those parks. For instance, there are full-time magistrate judges in Yosemite and Yellowstone National Parks. CJRA REPORT, E. DIST. OF CAL., *supra*, at 9; CJRA REPORT, DIST. OF WYO., *supra* note 96, at 3.

An increasingly common use of magistrate judges is to preside over settlement conferences. Recommendations for continuation, expansion, or initiation of magistrate judge settlement conferences are common themes in the advisory group reports.¹⁰⁸ Magistrate judges are particularly well suited to handle such conferences. Since most judges do not discuss settlement with counsel in cases over which they may preside at trial, a judge other than the trial judge is needed to preside over judicially-hosted settlement conferences. Magistrate judges, who are perceived as having fewer nondelegable tasks than district judges, are the logical choice to handle these conferences.

Some districts, however, have concluded that the time of judicial officers can be better spent than in presiding over settlement conferences.¹⁰⁹ The advisory group for the Western District of Tennessee concluded that district judges, rather than magistrate judges, should conduct settlement conferences: "While there is an increasing utilization of magistrate judges in the settlement process as the result of requests by the parties for a settlement conference, serious consideration should be given to making settlement conferences with a district judge routine, if possible."¹¹⁰

The advisory group for the Southern District of California proposed an early neutral evaluation program that "effectively sets up the magistrate judge as [the neutral evaluator] unless the district judge elects to supervise pre-trial proceedings. Since the magistrate judge is required by statute to tailor-make a case-spe-

¹⁰⁸ Judicially-hosted settlement conferences were held in many districts prior to the Civil Justice Reform Act. See, e.g., CJRA PLAN, N. DIST. OF IND., *supra* note 86, at 35-36; CJRA REPORT, DIST. OF WYO., *supra* note 96, at 13-14; CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE S. DIST. OF IND. 58 (1991) [hereinafter CJRA PLAN, S. DIST. OF IND.]. A full-time "settlement magistrate judge" in the Western District of Oklahoma predated that district's expense and delay reduction plan. CJRA REPORT, W. DIST. OF OKLA., *supra* note 83, at 14. This magistrate judge held 4880 settlement conferences between January 1, 1984, and June 30, 1991. *Id.*

In some districts, advisory groups recommended that settlement conference programs be adopted or expanded under the district's expense and delay reduction plan. CIVIL JUSTICE REFORM ACT OF 1990 REPORT, U.S. DIST. CT. FOR THE E. DIST. OF WIS. 21 (1991) [hereinafter CJRA REPORT, E. DIST. OF WIS.]; CJRA REPORT, S. DIST. OF ILL., *supra* note 84, at 43-45; CJRA REPORT, E. DIST. OF TENN., *supra* note 96, at 52-54; CJRA REPORT, DIST. OF KAN., *supra* note 81, at 57.

¹⁰⁹ CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE E. DIST. OF VA. 12 (1991); REPORT OF THE ADVISORY GROUP APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE N. DIST. OF GA., *reprinted in* 9 GA. ST. U. L. REV. 3, 56-59 (1992) [hereinafter CJRA REPORT, N. DIST. OF GA.].

¹¹⁰ CJRA REPORT, W. DIST. OF TENN., *supra* note 82, at 54.

cific pre-trial program, there is good reason to include neutral evaluation as part of those duties."¹¹¹

The advisory group for the Northern District of Georgia recommended a program of court-annexed arbitration with magistrate judges serving as arbitrators.¹¹² While the court's expense and delay reduction plan adopted the proposed arbitration plan, the district judges disagreed with the recommendation that magistrate judges serve as arbitrators.¹¹³ The court stated no reason why the proposal to use magistrate judges as arbitrators was rejected, but apparently the decision was prompted by the other demands placed upon magistrate judges and the hope that party consent to magistrate judge trials in civil cases would increase.¹¹⁴

Several advisory group reports and civil expense and delay reduction plans provide for, or presume a continued use of, magistrate judges to preside over discovery disputes, particularly in complex cases.¹¹⁵ However, the advisory group for the District of Alaska recommended that the court increase its use of discovery masters under Rule 53 of the Federal Rules of Civil Procedure, particularly in large, complex lawsuits. Rather than recommending that magistrate judges routinely fill such a role, the advisory group proposed that parties be given the option of having either a magistrate judge or a specially-appointed nonjudicial of-

¹¹¹ REPORT OF THE ADVISORY COMMITTEE TO THE FEDERAL DISTRICT COURT AS REQUIRED BY THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE S. DIST. OF CAL. 23 (1991) [hereinafter CJRA REPORT, S. DIST. OF CAL.]. This proposal was adopted in the court's expense and delay reduction plan, as well as a proposal providing for judicial officers (district or magistrate judges) to preside over summary jury trials and minitrials. DELAY AND COST REDUCTION PLAN ADOPTED BY THE DISTRICT COURT, U.S. DIST. CT. FOR THE S. DIST. OF CAL. 2, 4-5 (1991).

¹¹² CJRA REPORT, N. DIST. OF GA., *supra* note 109, reprinted in 9 GA. ST. U. L. REV. 3, 54-59 (1992).

¹¹³ CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE N. DIST. OF GA., reprinted in 9 GA. ST. U. L. REV. 99, 110 (1992) [hereinafter CJRA PLAN, N. DIST. OF GA.].

¹¹⁴ *Id.* at 113-14.

¹¹⁵ CJRA PLAN, DIST. OF WYO., *supra* note 88, at 11 (stating that new local rule will be adopted under which magistrate judge will hold scheduling conferences in complex cases); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF DEL. 4 (1991) (court may make use of magistrate judge to monitor discovery and resolve disputes in complex cases); *see* CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE W. DIST. OF TENN. 101 (1991); REPORT AND RECOMMENDATIONS OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE S. DIST. OF N.Y. 73-74 (1991) [hereinafter CJRA REPORT, S. DIST. OF N.Y.]; REPORT OF THE ADVISORY GROUP PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE N. DIST. OF W. VA. 20, 40-41 (1991).

ficer serve as discovery master.¹¹⁶ The advisory group for the District of Massachusetts criticized the practice in that district of referring all pretrial proceedings to magistrate judges because this "cedes management over discovery to these judicial officers and, since discovery drives much of today's litigation, for a time, the district judge loses control over the case."¹¹⁷

The advisory group for the Southern District of Florida recommended that the court consider whether particular magistrate judges should specialize in particular types of cases, such as social security, ERISA, Title VII, or civil rights cases.¹¹⁸ This recommendation was based upon the existing practice of assigning all prisoner civil rights cases to a single magistrate judge.¹¹⁹ Thus, just as different districts have defined the role of magistrate judge somewhat differently, some districts have defined the role of particular magistrate judges within their districts with greater specificity.

C. Magistrate Judges as Additional Judges

It is in connection with the use of magistrate judges as additional judges that the CJRA advisory groups have offered the most creative proposals. These proposals have been offered in an at-

¹¹⁶ CJRA REPORT, DIST. OF ALASKA, *supra* note 91, at 78-79. A similar recommendation was included in the expense and delay reduction plan adopted in the Northern District of Georgia, which contemplates the use of nonjudicial officers as special masters to handle discovery and other matters in complex cases. CJRA PLAN, N. DIST. OF GA., *supra* note 113, reprinted in 9 GA. ST. U. L. REV. 99, 111-12 (1992); see CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE W. DIST. OF OKLA. 6 (1991) [hereinafter CJRA PLAN, W. DIST. OF OKLA.] (similar recommendation adopted in Oklahoma); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE W. DIST. OF WIS. 4 (1991) (similar recommendation adopted in Wisconsin); REPORT OF THE ADVISORY GROUP APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE E. DIST. OF PA., reprinted in 138 F.R.D. 167, 279 (1991) [hereinafter CJRA REPORT, E. DIST. OF PA.] (similar recommendation pertaining to Pennsylvania). *But see* CJRA REPORT, W. DIST. OF MICH., *supra* note 90, at 147 ("[T]he use of magistrate judges as special masters or the use of other persons as special masters may be appropriate in [highly complex] cases."). The advisory group in the District of New Jersey concluded that "the designation of special masters serves the interests of both the Court and the parties by allowing complicated and protracted discovery disputes to be resolved expeditiously and by freeing the magistrates and judges to deal with the remainder of their dockets." CJRA PLAN, DIST. OF N.J., *supra* note 89, at 30-31.

¹¹⁷ REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE DIST. OF MASS., Addendum 8 (1991) [hereinafter CJRA REPORT, DIST. OF MASS.].

¹¹⁸ CJRA REPORT, S. DIST. OF FLA., *supra* note 98, at 49.

¹¹⁹ *Id.*

tempt to increase the number of civil cases over which magistrate judges can preside with the parties' consent.

Magistrate judges have had the authority to try civil cases with party consent since the Federal Magistrate Act of 1979.¹²⁰ Pursuant to this authority, magistrate judges in some districts have played a major role in resolving civil cases. In the District of Oregon, one of the districts studied by Professor Carroll Seron, the advisory group described the use of magistrate judges as follows:

In Oregon, magistrate judges are fully integrated into the court's civil case management practices. Under the Oregon model, magistrate judges are randomly assigned civil cases at the time of filing. Thereafter, the court actively encourages written "consents" pursuant to Federal Rules of Civil Procedure 73(b). Magistrate judges perform the full range of case management activities on all assigned cases and routinely receive consents to exercise full dispositive authority, to include trial.¹²¹

In many other districts, however, the number of cases in which parties have given the requisite consent for a magistrate judge to resolve civil litigation has been quite limited.¹²² This is

¹²⁰ See Pub. L. No. 94-577, § 1, 90 Stat. 2729, 2729 (1979) (codified at 28 U.S.C. § 636(b) (1993)). For a study of magistrate judge civil consent jurisdiction prior to the 1990 amendment of 28 U.S.C. § 636(c)(2), see Christopher E. Smith, *Assessing the Consequences of Judicial Innovation: U.S. Magistrates' Trials and Related Tribulations*, 23 WAKE FOREST L. REV. 455, 466-89 (1988).

¹²¹ REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE DIST. OF OR. 11 (1991) [hereinafter CJRA REPORT, DIST. OF OR.]. The District of Oregon was one of the districts studied by Professor Carroll Seron, who concluded:

Perhaps the most telling finding from interviews with attorneys in Oregon was the overwhelming consensus that consent to a trial before a magistrate under section 636(c) is considered a matter of course; indeed, most reported that it is "almost automatic." . . . For all practical purposes . . . the bar perceives magistrates as additional judges and, of equal importance, expressed a general comfort with this model so long as the magistrates are of a high caliber.

SERON, NINE CASE STUDIES, *supra* note 39, at 39; see REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE, U.S. DIST. CT. FOR THE DIST. OF IDAHO 3 (1991) ("It is the experience in this District that the bar has regularly consented to civil cases before the magistrate. We believe that this reflects confidence in the abilities of the magistrate judges.").

¹²² See, e.g., CJRA REPORT, DIST. OF WYO., *supra* note 96, at 43 ("Rules exist which allow the parties to consider alternative trial disposition by the Magistrate Judge, although it does not appear that this option is utilized."); CJRA REPORT, W. DIST. OF TEXAS, *supra* note 94, at 108 ("Historically, few civil litigants in the Western District have consented to trial before magistrate judges."); CJRA REPORT, DIST. OF ALASKA, *supra* note 91, at 82 ("Historically, few cases have been tried to the magistrate judges under [28 U.S.C. § 636(c)]."); CJRA REPORT, W. DIST. OF TENN., *supra* note 82, at 69 ("Although matters can be expedited where the parties consent to trial

not surprising in light of the former prohibition in section 636(c)(2) against judicial efforts to "persuade or induce" parties to consent to magistrate judge jurisdiction. "Read in context, the prohibition against district judge attempts to induce any party to consent effectively proscribed any mention of the possibility beyond the original notice from the Clerk."¹²³

However, the Federal Courts Study Committee Implementation Act of 1990 amended 28 U.S.C. § 636(c)(2) to permit district and magistrate judges to remind the parties of their right to consent to have their case decided by a magistrate judge.¹²⁴ Many of the early implementation districts have adopted procedures to implement this new statutory provision and to otherwise encourage parties to consent to suit before a magistrate judge, rather than before a district judge.

The major rationale offered by the advisory groups for their efforts to increase party consents is the increased judicial capacity that can be created if magistrate judges, like district judges, can dispositively resolve civil actions. As the advisory group in the Eastern District of New York noted:

[A]dditional trials by magistrate judges may contribute to the just, speedy, and efficient resolution of cases. . . . A magistrate judge, not encumbered by a significant number of criminal cases involving the Speedy Trial Act, is in a position to set and keep a firm trial date, whereas a district judge may have to adjourn a long-standing civil trial commitment to accommodate a criminal case. The availability of a firm trial date may eliminate problems in arranging the attendance of witnesses and address the many other logistical problems that attend the scheduling of attorneys' trial calendars.¹²⁵

By consent to magistrate judge jurisdiction, the parties may obtain not only a firm trial date, but also a trial judge who, in many

by the magistrate, the practice is seldom adopted in this district."). In the Northern District of Georgia, Internal Operating Procedure 920-1(b) provides that it is the "intention of the judges of this Court that the handling of the other duties assigned to the magistrates by the Court take priority over the trial of civil cases." CJRA REPORT, N. DIST. OF GA., *supra* note 109, *reprinted in* 9 GA. ST. U. L. REV. 3, 31 (1992).

¹²³ CJRA REPORT, E. DIST. OF PA., *supra* note 116, *reprinted in* 138 F.R.D. 167, 276 (1991).

¹²⁴ Pub. L. No. 101-650, § 308, 104 Stat. 5089, 5112 (1990) (codified at 28 U.S.C. § 636(c)(2) (1993)).

¹²⁵ CJRA REPORT, E. DIST. OF N.Y., *supra* note 97, *reprinted in* 142 F.R.D. 185, 250 (1991).

instances, will be familiar with their case as a result of presiding over pretrial proceedings.

In addition to these advantages to the parties, the court derives benefits from the resolution of civil cases by magistrate judges. As expressed by an advisory group in a non-early implementation district, "Every case resolved by a magistrate judge is one less case that the district judges need consider."¹²⁶

There are not only advantages for litigants and the district judges from magistrate judges functioning as "additional judges," but benefits to the magistrate judges themselves. As noted by the advisory group for the Western District of Texas, another non-early implementation district: "Increasing the opportunity of magistrate judges to try civil cases would add diversity to their workload and prestige to their office."¹²⁷

For these reasons, several advisory groups have recommended a greater involvement of magistrate judges in the civil docket. The advisory group in the Southern District of West Virginia recommended that "United States Magistrate Judges should become completely and integrally involved in civil proceedings from their initial stages."¹²⁸ Based upon its conclusion that "[m]agistrate judges are most effective when adjudicating entire cases, rather than parts of cases," the advisory group in the Eastern District of Arkansas recommended that civil cases be assigned to magistrate judges, as well as district judges, upon their filing.¹²⁹

In many districts, advisory groups recommended, and district courts adopted, techniques to encourage greater party consent to magistrate judge jurisdiction over civil cases. These techniques include: (1) providing the parties with more information concerning their right to consent to magistrate judge jurisdiction; (2) requiring that counsel explicitly address the question of magistrate

¹²⁶ CJRA REPORT, E. DIST. OF TENN., *supra* note 96, at 59.

¹²⁷ CJRA REPORT, W. DIST. OF TEX., *supra* note 94, at 109. In its interviews, the advisory group in the Southern District of Indiana found that "magistrate judges were enthusiastic about trying more cases." CJRA REPORT, S. DIST. OF IND., *supra* note 84, at 34 n.47; see Fed. Courts Study Comm., *supra* note 54, at 79 ("Some magistrates, believing that they are under-utilized, desire more diversity in the work they are assigned by the district court . . .").

¹²⁸ REPORT OF THE ADVISORY GROUP AND PLAN FOR IMPLEMENTATION OF THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE S. DIST. OF W. VA. 8 (1991) [hereinafter CJRA REPORT, S. DIST. OF W. VA.].

¹²⁹ CJRA REPORT, E. DIST. OF ARK., *supra* note 107, at 22, 23.

judge jurisdiction; (3) providing incentives for parties to consent to magistrate judge jurisdiction; and (4) redefining the manner in which party consent to magistrate judge jurisdiction is manifested.

1. Increasing Consent to Magistrate Judge Jurisdiction by Providing the Parties with Information

The major obstacle to increased party consent to magistrate judge jurisdiction is the perception that one or more parties may have an advantage if their case remains on the docket of a district judge. In some situations, the preference for a district judge may be based upon an informed knowledge of the relative strengths and weaknesses of the particular district judge and magistrate judge who may hear the case or upon other relevant factors. In other situations, a preference for the district judge may be based upon misinformation or a lack of information concerning either the office of magistrate judge in general or a particular magistrate judge.

This problem can be cured by providing attorneys with information concerning the office of magistrate judge and about particular magistrate judges. Some advisory groups have recommended that litigants receive information concerning their right to consent to trial before a magistrate judge.¹³⁰ Other advisory groups have recommended that their courts provide biographical information about judges so that parties can make an informed decision whether to consent to magistrate judge jurisdiction.¹³¹

¹³⁰ CJRA REPORT, E. DIST. OF N.Y., *supra* note 97, reprinted in 142 F.R.D. 185, 193 (1991); CJRA REPORT, DIST. OF WYO., *supra* note 96, at 50. The advisory group in the District of Wyoming found that parties were not consenting to magistrate judge jurisdiction for two reasons: "the fear of magistrate judges' level of trial experience and the opinion that lack of trial delay in the District does not necessitate the need for consent trials." *Id.* at 49; *see also* CJRA PLAN, S. DIST. OF IND., *supra* note 108, at 14 (proposing that court "publicize, perhaps through a local rule, the willingness of the magistrate judges to hear and resolve discovery disputes telephonically").

Even prior to the CJRA, litigants were provided with a booklet concerning dispute resolution procedures in the United States District Court for the Northern District of California, one section of which booklet concerns "Consent to Jury or Court Trial Before a Magistrate." U.S. Dist. Court for the N. Dist. of Cal., *Dispute Resolution Procedures in the Northern District of California* 8 (1989) [hereinafter *N. Dist. Cal. Dispute Resolution Procedures*]. Form 33 in the Appendix of Forms to the Federal Rules of Civil Procedure is the "Notice of Right to Consent to the Exercise of Civil Jurisdiction by a Magistrate and Appeal Option" provided to parties upon the filing of a civil action. FED. R. CIV. P. Form 33.

¹³¹ CJRA REPORT, E. DIST. OF TENN., *supra* note 96, at 76 ("Information concerning the district's judges might be particularly helpful to counsel from outside the dis-

Some systems of case assignment may discourage consent to magistrate judge jurisdiction because counsel do not know the specific magistrate judge who will hear their case if they consent to the resolution of their case in that manner.¹³² This problem is avoided in some districts by dual case assignments, at the outset of each case, to a specific district judge and a specific magistrate judge.¹³³ In the Eastern District of New York, the court adopted an advisory group recommendation that cases in which the parties consent to a magistrate judge trial will be tried by the magistrate judge assigned at the outset of the case or, if any party objects, by another randomly assigned magistrate judge.¹³⁴ Even prior to the CJRA, parties in the Northern District of California could select any available magistrate judge to hear their case.¹³⁵

tribut and might help these attorneys in deciding whether to consent to the exercise of civil jurisdiction by a magistrate judge."); see CJRA REPORT, DIST. OF ALASKA, *supra* note 91, at 83 (magistrate judges might become more visible to the legal community if they "participat[ed] at CLE programs, publications and the like"). See generally Joan Humphrey Lefkow, *An Invitation to Consent to Trial Before a United States Magistrate*, CBA RECORD, June 1990, at 28 (article in bar magazine by magistrate judge discussing availability of magistrate judge jurisdiction and advantages of consent to such jurisdiction).

¹³² See CJRA REPORT, E. DIST. OF ARK., *supra* note 107, at 22 ("[A]ttorneys have stressed that the parties are more likely to consent if they know on the front end which magistrate judge will preside over their case."). This may be analogous to the reluctance of some television game show contestants to give up the prize they have for the unknown prize behind "Door Number 3."

¹³³ See, e.g., CJRA REPORT, E. DIST. OF WIS., *supra* note 108, at 3; CJRA REPORT, E. DIST. OF N.Y., *supra* note 97, reprinted in 142 F.R.D. 185, 242 (1991); CJRA REPORT, E. DIST. OF ARK., *supra* note 107, at 23.

In the District of Oregon, magistrates are assigned civil cases on the same basis as are district judges, and it is only if parties do not consent to trial by the assigned magistrate judge that the case is reassigned to a district judge. CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF OR. 4, 8 (revised Apr. 23, 1992). One reason for increased party consent to magistrate judge jurisdiction under such a system has been suggested by the advisory group in the Southern District of Texas: "Frequently, once a magistrate has effectively handled pretrial requirements and the parties are comfortable with the magistrate's abilities and knowledge of the case, the parties will then consent to have the matter tried by a magistrate rather than a district judge." CJRA REPORT, S. DIST. OF TEX., *supra* note 91, reprinted in 11 REV. LITIG. 203, 251 n.60 (1992). The district judges in the Southern District of Texas adopted an advisory group recommendation that each district judge in the Houston division assign 5% to 10% of new civil filings to a magistrate judge "for handling of all pretrial responsibilities, and, on consent of the parties, through disposition." COST AND DELAY REDUCTION PLAN UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE S. DIST. OF TEX., reprinted in 11 REV. LITIG. 315, 317 (1992) [hereinafter CJRA PLAN, S. DIST. OF TEX.].

¹³⁴ CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE E. DIST. OF N.Y. 21 (1991) [hereinafter CJRA PLAN, E. DIST. OF N.Y.].

¹³⁵ N. Dist. Cal. Dispute Resolution Procedures, *supra* note 130, at 8.

2. Increasing Consent to Magistrate Judge Jurisdiction by Requiring Counsel to Address Such Consent

In some cases, the mere force of inertia causes a failure to elect magistrate judge jurisdiction. Even attorneys who are fully aware of their right to trial before a magistrate judge may not choose such a trial because it requires an affirmative effort on their parts. Some counsel may believe that if they broach the subject of magistrate judge jurisdiction with opposing counsel, there is little chance that opposing counsel will agree.¹³⁶ Other counsel may fear that their client would, at some point, second-guess the decision to select a magistrate judge, while there will be no decision to criticize if counsel does nothing and the case is heard by a district judge.

The problem of inertia is addressed in several expense and delay reduction plans by provisions requiring counsel to explicitly address magistrate judge jurisdiction at some point during the pretrial proceedings. Several districts¹³⁷ have followed the suggestion of the Federal Judicial Center that one of the matters that should be considered at pretrial conferences is "the feasibility of referral of the case, or certain matters, to a magistrate judge or master."¹³⁸ If they are asked directly about consent to magistrate judge jurisdiction at a pretrial conference, counsel are more likely to focus on the question than if they merely receive a consent form from the clerk's office.¹³⁹ However, the question of consent to magistrate judge jurisdiction should be raised in a manner that will "protect the voluntariness of the parties' consent."¹⁴⁰

¹³⁶ Counsel may believe that if magistrate judge jurisdiction is in the best interest of the opposing party, it cannot be in the best interest of their own client. The reluctance of some attorneys to raise consent to magistrate judge jurisdiction with opposing counsel may be analogous to the reluctance on the part of some attorneys to make the first offer of settlement. See DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* 99 (1989) ("[I]n some litigation contexts, an immediate offer to settle may be interpreted by the other attorney as a sign of weakness . . .").

¹³⁷ See, e.g., CJRA PLAN, E. DIST. OF N.Y., *supra* note 134, at 12; CJRA PLAN, S. DIST. OF IND., *supra* note 108, at 8; CJRA PLAN, S. DIST. OF ILL., *supra* note 88, at 8; CJRA PLAN, N. DIST. OF IND., *supra* note 86, at 14.

¹³⁸ Fed. Judicial Ctr., *Implementation of the Civil Justice Reform Act of 1990* 15 (Jan. 16, 1991).

¹³⁹ See COMPTROLLER GEN. OF THE U.S., GEN. ACCOUNTING OFFICE, *POTENTIAL BENEFITS OF FEDERAL MAGISTRATES SYSTEM CAN BE BETTER REALIZED* 40-41 (1983) (finding that personal follow-up by clerk's office after written notification of right to consent to magistrate judge jurisdiction increases number of parties consenting).

¹⁴⁰ 28 U.S.C. § 636(c)(2) (Supp. III 1992). While the 1990 amendment to section 636(c)(2) permits district judges to advise the parties of their right to consent to mag-

One advisory group has recommended that counsel meet and confer not only concerning consent to magistrate judge jurisdiction over civil cases in their entirety, but that dispositive motions be accompanied by a certificate that counsel have conferred concerning consent to the final resolution and entry of judgment on the dispositive motion by a magistrate judge.¹⁴¹

3. Increasing Consent to Magistrate Judge Jurisdiction by Providing the Parties with Incentives to So Consent

In many cases, providing counsel with full information about consent to magistrate judge jurisdiction and requiring that they address this possibility will not result in consent to such jurisdiction. This is because one or more parties may derive benefits from trial by a district, rather than a magistrate, judge. In such situations, counsel must perceive that their clients will gain other benefits to induce them to consent to magistrate judge jurisdiction.¹⁴²

Under many civil justice expense and delay reduction plans, the benefit offered in return for consent to trial before a magistrate judge is the prospect of an earlier trial or other form of case resolution than could be arrived at by a district judge.¹⁴³ Under

istrate judge jurisdiction, "when a [district] judge suggests that parties consent, [at least some attorneys] feel they have no alternative." SERON, NINE CASE STUDIES, *supra* note 39, at 65; see Smith, *supra* note 120, at 474-79.

¹⁴¹ CJRA REPORT, E. DIST. OF TENN., *supra* note 96, at 61-63. The advisory group in the Eastern District of Wisconsin recommended that the federal and state governments consent to magistrate judge jurisdiction in prisoner and social security cases, which often are resolved by dispositive motions. CJRA REPORT, E. DIST. OF WIS., *supra* note 108, at 26.

¹⁴² For an enumeration of factors that may be relevant to the decision whether to consent to trial before a magistrate judge, see the United States Department of Justice regulations governing departmental attorneys in making this decision, 28 C.F.R. § 52.01(b) (1992). In determining whether consent to magistrate judge jurisdiction is "in the interest of the United States," attorneys are to consider such factors as case complexity, the relief sought, the "novelty, importance and nature of the issues raised," the likelihood that the case can be resolved more expeditiously by a magistrate, rather than district judge, and the "experience and qualifications of the magistrate." *Id.* For a practitioner's view of consent to magistrate judge jurisdiction under these regulations, see Daniel A. Morris, *Consenting to Civil Trial by a United States Magistrate Judge*, 24 CREIGHTON L. REV. 871 (1991).

¹⁴³ See, e.g., CJRA PLAN, S. DIST. OF IND., *supra* note 108, at 5. The converse of this is also possible; if a particular district judge is noted for moving cases very quickly to trial, counsel may decide to consent to magistrate judge jurisdiction in order to delay, rather than speed, the ultimate trial date. A form scheduling order proposed by the advisory group in the District of Alaska provides that the dates contained in that order shall be effective in 30 days unless a party shows good cause for modification of a date or the parties file a consent to proceed before a magistrate judge

the expense and delay reduction plan in the Eastern District of Wisconsin, the standard magistrate judge consent form has been amended by the addition of the following statement:

MAGISTRATE JUDGES DO NOT CONDUCT TRIALS IN FELONY CASES. ACCORDINGLY, IF THIS CASE IS TRANSFERRED ON CONSENT TO THE MAGISTRATE JUDGE, MAJOR CRIMINAL CASES WILL NOT INTERFERE WITH ITS SCHEDULING AND PROCESSING. IN ALL LIKELIHOOD, THEREFORE, A CONSENT WILL MEAN THAT THIS CIVIL CASE WILL BE RESOLVED SOONER AND MORE INEXPENSIVELY FOR THE PARTIES.¹⁴⁴

The prospect of an earlier trial can be particularly attractive if the parties have prepared for trial before a district judge, only to find on the eve of the scheduled trial that this judge cannot try the case.¹⁴⁵

In some situations, however, a faster case resolution will not be perceived as a "benefit" to all parties. "Defendants in civil actions recognize that if they consent to trial before a magistrate judge, they are likely to receive a more prompt trial. Many defendants simply do not want a more prompt trial and thus withhold their consent."¹⁴⁶ A "principal cause[] of cost and delay"¹⁴⁷ recognized by one advisory group is "lawyer and litigant choice for delay," which manifests itself in refusal to consent to magistrate judge jurisdiction.¹⁴⁸

The advisory group for the Western District of Texas proposed a procedure that would give litigants who consent to magistrate

(who then will set appropriate dates). CJRA REPORT, DIST. OF ALASKA, *supra* note 91, at 2, app. 11.

¹⁴⁴ CJRA PLAN, E. DIST. OF WIS., *supra* note 99, at 22.

¹⁴⁵ See CJRA REPORT, S. DIST. OF W. VA., *supra* note 128, at 8. In several districts, if a district judge cannot try a case when pretrial proceedings are complete, the parties are offered an immediate trial before a magistrate judge. CJRA REPORT, S. DIST. OF N.Y., *supra* note 115, at 52; CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE E. DIST. OF PA. 10 (1991); see also CJRA REPORT, E. DIST. OF TENN., *supra* note 96, at 61. The Ninth Circuit Judicial Council's United States Magistrates Advisory Committee has recommended that parties whose civil cases have been pending for more than three years be encouraged to consider trial before a magistrate judge. U.S. MAGISTRATES ADVISORY COMM., NINTH CIRCUIT JUDICIAL COUNCIL, STUDY OF MAGISTRATES WITHIN THE NINTH CIRCUIT COURT OF APPEALS 59 (Aug. 15, 1990).

¹⁴⁶ CJRA REPORT, W. DIST. OF TEX., *supra* note 94, at 108; see CJRA REPORT, W. DIST. OF TENN., *supra* note 82, at 69 ("Perhaps the parties do not consent because it is almost always in one party's interest to avoid going to trial.").

¹⁴⁷ 28 U.S.C. § 472(c)(1)(C) (Supp. III 1992).

¹⁴⁸ CJRA REPORT, E. DIST. OF TENN., *supra* note 96, at 45-46.

judge jurisdiction an entire packet of procedural benefits. This advisory group recommended the creation of a "rocket docket," guaranteeing the parties a trial within four months after their consent to jurisdiction by a magistrate judge. Cases on this docket would not have been subject to scheduling orders, pretrial orders, or mandatory alternative dispute resolution requirements.¹⁴⁹ Motions arising in these cases would have been heard orally with limited briefing.¹⁵⁰ The sole condition for placement upon the "rocket docket" and receipt of these benefits would have been the consent to jurisdiction by a magistrate judge.¹⁵¹ The "Expedited Docket" actually adopted in the Western District of Texas is not restricted to cases in which the parties have consented to magistrate judge jurisdiction. However, parties who consent to the trial of an "Expedited Docket" case by a magistrate judge are guaranteed a trial within four months of their consent.¹⁵²

The "voluntary expedited" case track in the Western District of Michigan operates in similar fashion. If parties waive their right to trial by an Article III judge, their case will be placed on a track with limited discovery for a disposition in less than nine months.¹⁵³

4. Increasing Consent to Magistrate Judge Jurisdiction by Redefining Such Consent

A final manner in which one district has attempted to encourage consent to magistrate judge jurisdiction is by redefining the manner in which consent is manifested by the parties. The advisory group for the District of Montana recommended, and the court approved, a procedure permitting a district judge to adopt an assignment plan under which civil cases are randomly assigned to a magistrate judge, and the failure of a party to serve a demand for a district judge within ten days after the last responsive pleading is considered a waiver of that party's right to a district judge.¹⁵⁴

¹⁴⁹ CJRA REPORT, W. DIST. OF TEX., *supra* note 94, at 109-10.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 110.

¹⁵² CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE W. DIST. OF TEX. 6-7 (1992).

¹⁵³ DIFFERENTIATED CASE MANAGEMENT PLAN, U.S. DIST. CT. FOR THE W. DIST. OF MICH. 2 (as amended Sept. 1, 1992).

¹⁵⁴ CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF MONT. 28 (1992) (Local Rule 105-2(d)). The Judicial Conference of the United

In recommending this procedure, the court's advisory group concluded:

[T]he increased utilization of the magistrate judges throughout the civil litigation process will prove to be the singularly most effective tool which can be implemented in the District to ensure effective case management and defeat delay and cost in the civil litigation process The requirement that a judicial officer actively participate in the pretrial proceedings will place a significant demand upon the district judges. The incorporation of the magistrate judges in the case assignment process will operate to alleviate the burden on district judges while enhancing the overall effectiveness of the case management system.¹⁵⁵

The assignment procedure adopted in the District of Montana is similar to that employed by the Book of the Month Club: if the proper form is not submitted by a specific date, the litigant will receive, not a book, but a magistrate judge. The advantage of the requirement that a district judge be demanded at the very outset of a case, as seen by the advisory group, is that case management will be facilitated because of the prompt assignment of the case to the judicial officer who will be responsible for that case.¹⁵⁶

The United States Court of Appeals for the Ninth Circuit has questioned this redefinition of "consent."¹⁵⁷ While there is precedent for the waiver of constitutional rights in this manner,¹⁵⁸ there is a serious question about the validity of this provision

States has endorsed this type of "opt-out" waiver system for designating the trial judge as a means of obtaining the consent of defendants to magistrate judge trial of misdemeanor actions. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 30 (Mar. 16, 1992).

¹⁵⁵ REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE DIST. OF MONT. 46-47 (1991) [hereinafter CJRA REPORT, DIST. OF MONT.]. The advisory group also mentioned that two of the five divisional offices within the District of Montana were unstaffed by judicial officers and that magistrate judges, with more flexible schedules than district judges, were better suited to conduct judicial proceedings in those divisions. *Id.* at 48.

¹⁵⁶ *Id.* at 49.

¹⁵⁷ Civil Justice Reform Act Review Comm., U.S. Court of Appeals for the Ninth Circuit, Minutes of Telephone Conference 3 (Apr. 2, 1992) (on file with author) [hereinafter CJRA Review Committee Minutes]. Nevertheless, this opt-out provision has become effective under an amended local rule in the District of Montana. *Id.*; U.S. DIST. COURT FOR THE DIST. OF MONT., PLAN 28 (Apr. 1, 1992) (Local Rule 105-2).

¹⁵⁸ FED. R. CIV. P. 38(b), (d) (right to trial by jury waived unless asserted not later than ten days after service of last pleading directed at issue to which right to jury pertains); see *Communications Maintenance, Inc. v. Motorola, Inc.*, 761 F.2d 1202, 1207-09 (7th Cir. 1985); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir.), *cert. denied*, 474 U.S. 865 (1985).

under 28 U.S.C. § 636(c)(2). This statutory provision, as amended by the Judicial Improvements Act of 1990, provides that the "decision of the parties" to consent to magistrate judge jurisdiction "shall be communicated to the clerk of court." This section further provides, "Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent."¹⁵⁹

While other courts have not taken the same procedural approach to consent as the District of Montana, a common theme in advisory group reports and expense and delay reduction plans is encouragement of party consent to magistrate judge jurisdiction over civil cases.

IV. HAVE THE DISTRICT COURTS MADE OPTIMAL USE OF MAGISTRATE JUDGES?

Whether the various advisory group reports and expense and delay reduction plans contemplate the best use of magistrate judges is a question that must be answered on a district-by-district basis. One thing that can be said in favor of the changes in the duties of magistrate judges wrought by the CJRA is that those changes have occurred at the district court level. While the CJRA has been rightly criticized for encouraging a balkanization of federal civil procedure,¹⁶⁰ the most appropriate use of magistrate judges is one question that is best answered at the district court level.

An effective use of magistrate judges in one district might be to hold evidentiary hearings in state prisons in connection with civil rights and postconviction relief claims.¹⁶¹ In another district, magistrate judges may more effectively be used to conduct pretrial proceedings in civil cases,¹⁶² handle Title VII and Truth in Lend-

¹⁵⁹ 28 U.S.C. § 636(c)(2) (Supp. III 1992); see H.R. REP. NO. 734, 101st Cong., 2d Sess. 27 (1990) ("The right of a litigant to have his civil case heard by an Article III judge remains paramount.").

Both before and after the enactment of the Judicial Improvements Act of 1990, courts have recognized that party consent to magistrate judge jurisdiction must be voluntary, clear, and unambiguous and cannot be inferred from party conduct. See, e.g., *Jaliwala v. United States*, 945 F.2d 221, 223-24 (7th Cir. 1991); *Glover v. Alabama Bd. of Corrections*, 660 F.2d 120, 124 (5th Cir. 1981).

¹⁶⁰ Tobias, *Civil Justice Reform*, *supra* note 11; Mullenix, *The Counter-Reformation in Procedural Reform*, *supra* note 11, at 380-81.

¹⁶¹ See CJRA REPORT, E. DIST. OF TEX., *supra* note 107, at 25.

¹⁶² See CJRA REPORT, E. DIST. OF N.Y., *supra* note 97, reprinted in 142 F.R.D. 185, 250 (1992).

ing Actions,¹⁶³ try criminal misdemeanor cases,¹⁶⁴ or hear civil cases in which the parties have consented to magistrate judge jurisdiction.¹⁶⁵ The various advisory group recommendations and expense and delay reduction plans are quite appropriately based upon determinations of the most effective use of particular magistrate judges within particular judicial districts. These determinations, in turn, are based upon the unique local character of each district.

Whether these determinations are correct can only be decided once a district's expense and delay reduction plan is fully operational. The CJRA requires that each district, after adoption of its plan, conduct annual assessments of its dockets "with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court."¹⁶⁶ The use of magistrate judges is one topic that appropriately may be addressed in these annual assessments.

Regardless of the uses of magistrate judges in particular districts, the CJRA has provided a valuable opportunity to review "the role and responsibility of . . . Magistrate Judges."¹⁶⁷ This review comes at a good time in the evolution of the office of magistrate judge. The value of the review is enhanced because the CJRA requires consideration of not only the views of district judges, for and with whom magistrate judges work, but also of the advisory group members who are removed from the internal operations of the federal courthouses. The advisory groups bring the perspective of the practicing bar to the reform process, and these groups can advocate the optimal use of magistrate judges for the court as a whole, rather than the most advantageous use of magistrate judges for individual district judges. This independent perspective is particularly important because, while magistrate judges were consulted by many advisory groups,¹⁶⁸ the CJRA does not provide any specific role for magistrate judges in the formula-

¹⁶³ See CJRA REPORT, N. DIST. OF GA., *supra* note 109, reprinted in 9 GA. ST. U. L. REV. 3, 31, 52 (1992).

¹⁶⁴ See CJRA REPORT, W. DIST. OF TEX., *supra* note 94, at 120.

¹⁶⁵ See CJRA REPORT, DIST. OF OR., *supra* note 121, at 7.

¹⁶⁶ 28 U.S.C. § 475 (Supp. III 1992).

¹⁶⁷ CJRA REPORT, N. DIST. OF OHIO, *supra* note 106, at 29.

¹⁶⁸ In some districts, magistrate judges served as regular or *ex officio* members of the CJRA advisory group. See, e.g., CJRA REPORT, E. DIST. OF ARK., *supra* note 107, app. A-7; CJRA REPORT, DIST. OF MASS., *supra* note 117, at 1; CJRA REPORT, DIST. OF KAN., *supra* note 81, app. 1. In the District of Wyoming, the Clerk/Magistrate Judge

tion of advisory group reports or the approval of expense and delay reduction plans.

Despite local variations in the use of magistrate judges, some common themes concerning magistrate judges emerge from the initial advisory group reports and expense and delay reduction plans. The greatest projected change in the role of magistrate judges is as additional trial judges pursuant to section 636(c) of title 28. By increasing the number of parties consenting to magistrate judge jurisdiction, advisory groups have attempted to add additional judicial capacity to the federal district courts. Thus the CJRA, with all of its emphasis on innovative case management and nontraditional techniques of dispute resolution, may have resulted in increased use of magistrate judges to resolve cases "the old-fashioned way," by presiding over trials and by resolving civil cases short of trial.¹⁶⁹

Aside from the decision of so many district courts to encourage party consent to magistrate judge jurisdiction and to use magistrate judges to preside over settlement conferences, the early implementation district reports and plans evidence no consensus concerning the optimal role for magistrate judges to play in civil justice reform. Magistrate judges apparently have been assigned tasks under expense and delay reduction plans in some districts not because they are particularly well-suited to perform those tasks but, instead, because they are available to handle the tasks.¹⁷⁰ In some districts, other persons may be better able to handle certain tasks assigned to magistrate judges. An additional law clerk, working with a district judge, may be able to prelimina-

served as reporter for the CJRA Advisory Group. CJRA REPORT, DIST. OF WYO., *supra* note 96, at iv.

¹⁶⁹ Some districts explicitly have considered magistrate judge consent trials of civil actions to be a form of alternative dispute resolution. CJRA REPORT, DIST. OF MONT., *supra* note 155, at 89 ("The Plan should affirm the district's commitment to the utilization of magistrate judges as the principal alternative means for resolution of civil litigation."); CJRA REPORT, DIST. OF ALASKA, *supra* note 91, at 80, 82-83; see also *N. Dist. Cal. Dispute Resolution Procedures*, *supra* note 130.

¹⁷⁰ Cf. Sir Edmund Hillary's purported response to the question of why he climbed Mt. Everest: "Because it is there."

In some districts, the special expertise of officials other than magistrate judges and active district judges has been utilized quite specifically. See, e.g., CJRA PLAN, S. DIST. OF TEX., *supra* note 133, reprinted in 11 REV. LITIG. 315, 315 (1992) ("Existing differential case management of asbestos cases [is conducted] through a Special Master, Veteran's Administration and Student Loan cases through assignment to a single Senior Judge, and prisoner civil rights and habeas corpus cases through Staff Attorney screening and processing . . .").

rily handle prisoner petitions, social security appeals, or fee petitions just as ably, and significantly more inexpensively, than can a magistrate judge.¹⁷¹ An alternative dispute resolution specialist may bring greater expertise, and have more time to devote, to the mediation or other resolution of disputes than a magistrate judge who has many other, disparate duties.¹⁷² If available, additional Article III judges may be the best persons to try civil lawsuits.¹⁷³ Additionally, parties may choose to have magistrate judges perform certain dispute resolution functions not only because these judicial officers are available, but also because their services can be provided to parties without additional charge.¹⁷⁴

¹⁷¹ Included in the expense and delay reduction plan in the Western District of Missouri is a proposal to request funding to employ an additional law clerk with medical training to process all social security disability appeals. CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE W. DIST. OF MO. 5-6 (1992).

¹⁷² The Northern District of California has received funding under the CJRA for two law-trained professionals with the necessary administrative staff support to administer the court's alternative dispute resolution program. CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE N. DIST. OF CAL. 11 (1991). The court recognized that "the development and administration of the Court's ADR programs, especially ENE, have depended too heavily in the past on the work of a magistrate judge whose other duties necessarily have limited the resources he has been able to commit to this important work." *Id.*

¹⁷³ This is the position taken by the advisory group in the Western District of Tennessee, which "concluded that the concept of magistrate judges may be inefficient" due to frequent appeals from the decisions of magistrate judges to district judges. CJRA REPORT, W. DIST. OF TENN., *supra* note 82, at 69-70. This group suggested that the position of magistrate judge could be abolished and a district judgeship created for every abolished magistrate judgeship. *Id.* at 70-71; *see also* CJRA REPORT, DIST. OF UTAH, *supra* note 95, at 35.

[T]he quality of the results of the litigation may be higher where a trial judge concentrates his judicial expertise and energies on the primary substantive issues of the case Although such analyses are beyond the scope of this report, if such hypotheses [were true they] could undermine the Congress's assumptions that the creation of a subordinate tier of judicial officers (magistrate judges) would be more efficient than creating additional Article III judgeships.

Id.

This was not, however, the view in other districts. In fact, while only four of the 34 early implementation district courts expressed a need for additional district judges in their expense and delay reduction plans, eight districts expressed a need for additional magistrate judges to implement their plans. CJRA REPORT, *supra* note 6, at 18.

¹⁷⁴ Even if magistrate judges are the appropriate persons to provide dispute resolution services, it may not be inappropriate to charge parties for these services. An "ADR surcharge" also might be added to court filing fees and used to fund dispute resolution services, especially to subsidize parties who are unable to themselves pay for such services. *See* Frank E.A. Sander, *Paying for ADR*, A.B.A. J., Feb. 1992, at 105.

Because magistrate judges are "there" and are "free," it is surprising that district courts have not made greater use of magistrate judges in newly-instituted dispute resolution programs. Whether a district has utilized magistrate judges in connection with alternative dispute resolution depends, in large measure, upon the type of alternative dispute resolution provided in that district. Apart from magistrate judge settlement conferences, most districts have not used judges to serve as arbitrators, mediators, early neutral evaluators, or special masters.¹⁷⁵ In contrast, those districts providing for summary jury trials and mini-trials in their expense and delay reduction plans typically contemplate that either district or magistrate judges will preside over those proceedings.¹⁷⁶

Magistrate judges may not have been used more extensively in newly-instituted dispute resolution programs because they simply cannot perform all of the tasks envisioned for them in some of the advisory group reports and expense and delay reduction plans. Some districts, for example, have recognized that magistrate judges will remain so heavily involved in certain tasks, such as handling criminal cases, that they cannot be expected to perform other significant duties.¹⁷⁷ As is stated in the report of the advi-

¹⁷⁵ See, e.g., CJRA PLAN, W. DIST. OF OKLA., *supra* note 116, at 6-1 (arbitrators); REPORT AND PLAN OF THE ADVISORY GROUP APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE DIST. OF THE V.I. 30-36 (1991) (mediators); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE N. DIST. OF W. VA. 81 (1991) [hereinafter CJRA PLAN, N. DIST. OF W. VA.] (early neutral evaluators); CJRA PLAN, N. DIST. OF GA., *supra* note 113, *reprinted in* 9 GA. ST. U. L. REV. 99, 111-12 (1992) (special masters).

Under the expense and delay reduction plans of the District of Kansas and Eastern District of Wisconsin, judges may refer cases for settlement discussions to a magistrate judge, district judge, or private mediator. CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF KAN. 9 (1991); CJRA PLAN, E. DIST. OF WIS., *supra* note 99, at 21. Under the expense and delay reduction plan in the Southern District of Texas, the court is to maintain a list of private providers of alternative dispute resolution services such as mediation, mini-trial, summary jury trial, and arbitration. CJRA PLAN, S. DIST. OF TEX., *supra* note 133, *reprinted in* 11 REV. LITIG. 315, 321 (1992).

¹⁷⁶ See, e.g., CJRA PLAN, N. DIST. OF OHIO, *supra* note 100, at 24, 27; CJRA PLAN, N. DIST. OF W. VA., *supra* note 175, at 81; see also *N. Dist. Cal. Dispute Resolution Procedures*, *supra* note 130.

¹⁷⁷ See, e.g., CJRA REPORT, DIST. OF ALASKA, *supra* note 91, at 61; CJRA REPORT, N. DIST. OF GA., *supra* note 109, *reprinted in* 9 GA. ST. U. L. REV. 3, 50 (1992); CJRA REPORT, S. DIST. OF W. VA., *supra* note 128, at 93; CJRA REPORT, S. DIST. OF ILL., *supra* note 84, at 20-21; FINAL REPORT FROM THE ADVISORY GROUP APPOINTED PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE DIST. OF DEL. 40 (1991) [hereinafter CJRA REPORT, DIST. OF DEL.].

sory group in the Southern District of California, "[a]lthough Congress envisioned that magistrate-judges should play an important role in implementing the [CJRA], magistrate judges in districts such as Southern California with exceptionally heavy criminal caseloads may not have time to assist significantly with civil cases."¹⁷⁸

In other districts, magistrate judges who already are working at full capacity have been assigned additional tasks under expense and delay reduction plans.¹⁷⁹ The advisory group for the Southern District of New York recommended an increased role for

The advisory group in the Northern District of Indiana, recognizing that magistrate judges cannot do everything, stressed the importance of specifying the tasks that magistrate judges are expected to perform:

[T]he court should clearly establish the priorities for any new magistrate judges; for instance, the top priority might be to have more pretrial management and supervision of the mandatory disclosure process, or it might be to mediate cases, or it might be to provide the court with reports and recommendations on dispositive motions in Social Security and bankruptcy appeals and prisoner cases. Whatever the priorities, the court must confine the new magistrate judges to these tasks, and consequently must seek to find persons with a particular commitment to their accomplishment.

CJRA REPORT, N. DIST. OF IND., *supra* note 91, at 78; *see* CJRA REPORT, DIST. OF DEL., *supra*, at 49-50.

¹⁷⁸ CJRA REPORT, S. DIST. OF CAL., *supra* note 111, Exhibit B at 6-7; *see* CJRA REPORT, S. DIST. OF N.Y., *supra* note 115, at 29 ("Magistrate judges appear to be overburdened with current responsibilities. Only a shift in the nature of these responsibilities will permit the use of magistrate judges to alleviate delay further."); CJRA REPORT, W. DIST. OF TEX., *supra* note 94, at 107.

¹⁷⁹ *See* CJRA Review Committee Minutes, *supra* note 157, at 2 ("Report from Justice Research Institute indicates that Magistrate Judges, because of criminal case workload, will likely have little time to provide substantial assistance to civil docket, which is counter to the Plan's involvement of Magistrate Judges in early judicial intervention.").

However, the experience in some districts has been different. A theme running through several of the advisory group reports is that magistrate judges have not been effectively utilized and are working at less than "full capacity." *See* CJRA REPORT, S. DIST. OF ILL., *supra* note 84, at 53 (noting that group's questionnaires and interviews indicate "that the Magistrate Judges had more time available than the District Judges."); CJRA PLAN, DIST. OF MASS., *supra* note 82, at 15 ("Magistrate judges represent a resource of enormous potential. Every effort must be undertaken to maximize their utility."); *see also* CJRA REPORT, E. DIST. OF TENN., *supra* note 96, at 39. At least some of these findings may have been suggested by a memorandum prepared by the Administrative Office of the United States Courts that stated: "The Advisory Group should satisfy itself . . . that the magistrate judge resources of a district are not being underutilized." MAGISTRATE JUDGE JURISDICTION AND UTILIZATION, *supra* note 78, at 6. This memorandum was sent to all advisory groups by the Director of the Administrative Office of the United States Courts. Memorandum from L. Ralph Mechem to Chairpersons of Advisory Groups Appointed under the Civil Justice Reform Act (Sept. 17, 1991).

magistrate judges in the civil pretrial process, but recognized that this additional work could not be handled by the magistrate judges unless their existing duties were curtailed. It therefore recommended that magistrate judges no longer be assigned dispositive motions, social security appeals, and habeas corpus petitions.¹⁸⁰

Regardless of the roles played by magistrate judges under particular expense and delay reduction plans, the office of magistrate judge will, on balance, grow under the CJRA. At a time when magistrate judges in some districts are struggling to enhance their status within the federal judiciary,¹⁸¹ many of their new roles under the expense and delay reduction plans should increase their stature with both the district judges and the attorneys with whom they work. The availability of magistrate judges also may make some districts more open to new alternative dispute resolution and case management techniques. District judges who are hesitant to themselves utilize some of these techniques

¹⁸⁰ CJRA REPORT, S. DIST. OF N.Y., *supra* note 115, at 74.

Appointing significant numbers of additional magistrate judges to handle both traditional duties and new tasks created under expense and delay reduction plans is problematic. See FED. COURTS STUDY COMM., *supra* note 54, at 6-8; see CJRA REPORT, DIST. OF ALASKA, *supra* note 91, at 44.

Some have criticized the increasing reliance of the federal courts upon "judicial adjuncts" such as magistrate judges. See Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2215-16 (1989); Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581 (1985); Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2132-33 (1989). However, Judge Jack Weinstein has concluded that "[t]he one innovation since the 1938 Rules that has been the most helpful in meeting new strains [under the Federal Rules of Civil Procedure] is the creation of, and substantial delegation of power to, federal magistrates." Jack B. Weinstein & Jonathan B. Wiener, *Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the Federal Rules of Civil Procedure*, 62 ST. JOHN'S L. REV. 429, 437 (1988).

There also are quite practical reasons to expand federal judicial capacity through increasing the number of magistrate judges, rather than district judges.

Creating new magistrate judge positions provides greater flexibility than does authorizing new district judgeships; the total number may be raised or lowered more readily in response to changes in docket conditions. Beyond this, it is more economical to add magistrate judges than to add district judges, and it is far simpler and typically more expeditious.

CJRA REPORT, E. DIST. OF PA., *supra* note 116, reprinted in 138 F.R.D. 167, 278 (1991).

¹⁸¹ Christopher E. Smith, *The Development of a Judicial Office: United States Magistrates and the Struggle for Status*, 14 J. LEGAL PROF. 175, 178-80 (1989).

may be willing to have magistrate judges experiment with these newer methods of case management and dispute resolution.¹⁸²

The many efforts to increase the number of cases in which parties consent to magistrate judge jurisdiction may have a beneficial, across-the-board impact on the federal district courts. To the extent that magistrate judges try civil actions, they are more likely to be perceived as "real" judges by attorneys and their clients. This can only have a positive effect upon magistrate judges, increase the status of their office, and help attract the best attorneys to fill magistrate judgeships.

An increased trial role for magistrate judges should make them more effective in their nontrial duties. A major advantage of using magistrate judges rather than nonjudicial officers to preside over settlement conferences is that judges, because of their office, may be more effective in helping parties evaluate their cases and reach agreement. To the extent that magistrate judges are not perceived as possessing full judicial authority, however, there may be little advantage, other than their availability, in using such judges to preside at settlement conferences. Perceived judicial authority is also necessary if magistrate judges are to be most effective in conducting other pretrial tasks. Counsel may not thoroughly prepare for a pretrial conference before a magistrate judge who is perceived as merely a court functionary, yet attorneys may be more ready to appeal the decisions of a magistrate judge, since a magistrate judge is not seen as a true judicial officer.

Increased magistrate judge jurisdiction over civil trials is thus not only of interest to individual magistrate judges, but should help to validate the position of magistrate judge within the federal judiciary. District judges faced with increasing caseload pressures also should welcome party consents that will lighten their own trial calendars. Yet, efforts must be made to "protect the voluntariness of the parties' consent" to magistrate judge jurisdiction.¹⁸³ This will require not merely appropriate consent procedures, but a determination on the part of judges and court personnel to administer such procedures to avoid the "velvet blackjack" problem" of coerced consent.¹⁸⁴

¹⁸² Smith, *supra* note 39, at 156-59. Prior to the enactment of the CJRA, magistrate judges were a source of innovation within the federal district courts. *Id.*

¹⁸³ 28 U.S.C. § 636(c)(2) (Supp. III 1992).

¹⁸⁴ H.R. REP. NO. 1364, 95th Cong., 2d Sess. 14 (1978) (House of Representatives Report on Federal Magistrate Act of 1979). Even the restrictive consent provisions of the Federal Magistrate Act of 1979 were criticized because they had "yet to be tested

A balance must be struck within each district concerning the appropriate role of magistrate judges. Magistrate judges are "subordinate, but independent, officers of the district courts,"¹⁸⁵ who are to help district judges administer justice. As the district judges in the Western District of Wisconsin recognized in that district's expense and delay reduction plan:

[T]he effectiveness of the judicial officers depends heavily on the efforts and efficiency of the entire court staff. All of the court's work will be analyzed regularly to determine whether it is a kind that can be performed only by an Article III judge or whether it will be delegated to magistrate judges, deputy clerks, law clerks or secretaries.¹⁸⁶

The most effective use of magistrate judges can only be determined within the context of an individual district's overall efforts to reduce litigation expense and delay. By creative use of magistrate judges in individual districts, civil justice reform can be achieved most effectively throughout the federal judicial system.

CONCLUSION

During its twenty-five year existence, the office of federal magistrate judge has evolved significantly. The initial evolution of this position was the result of statutory amendment, judicial decision, and experimentation within individual judicial districts. The perceived need for civil justice reform as reflected in the Civil Justice Reform Act has ensured that these local experiments will continue. Although district courts have undertaken different

in a pressured environment where reference is perceived by all participants to be the norm rather than the exception." Reinier H. Kraakman, Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1051 (1979). For more recent discussions of efforts to obtain party consent to magistrate judge jurisdiction, see Claudia L. Psome, Note, *Magistrates: Constitutionality and Consent*, 36 N.Y.L. SCH. L. REV. 675 (1991); Christopher E. Smith, *From U.S. Magistrates to U.S. Magistrate Judges: Developments Affecting the Federal District Courts' Lower Tier of Judicial Officers*, 75 JUDICATURE, Dec.-Jan. 1991, at 210, 213-14.

¹⁸⁵ Judicial Conference of the U.S., *supra* note 62, at 41.

¹⁸⁶ CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE W. DIST. OF WIS. 1-2 (1991); see Steven Puro & Roger Goldman, *U.S. Magistrates: Changing Dimensions of First-Echelon Federal Judicial Officers*, in THE POLITICS OF JUDICIAL REFORM 137, 145-46 (Philip L. Dubois ed., 1982) ("The overuse of consensual jurisdiction may irreparably harm the value of the magistrate. While each magistrate could handle a few dispositive motions and trials, an ever-increasing number of such matters would threaten his ability to keep cases moving toward a conclusion.").

techniques to combat unnecessary delay and expense in civil litigation, magistrate judges are essential to the implementation of these techniques and will play an important role in civil justice reform efforts in the federal district courts.

